Supreme Court, U.S.
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In the
Supreme Court of the United States

James WILLIAMS, ~~Jr.; Jimmy E.~~ McKelvy; James Gilchrist; Bobby Lacy; Robert McKithen, Jr.; Kevin McKie; Robert Cooks, Jr.; Edward N. Gray; Nathaniel Lockhart, on behalf of themselves and all others similarly situated, Plaintiffs

OF WHOM James Williams, Jr. and Nathaniel Lockhart, are Petitioners,

v.

William J. HENDERSON,
Postmaster General United States Postal Service,
Respondent,

and

Richard E. Barnhill; David O. Brandon; Charles J. Cutter, II; Emma Oliver; Penny Joye; Sonny Powell; John A. Frye; James Stih; Ronald Hopson; David Black, Defendants.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

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QUESTIONS PRESENTED FOR REVIEW

The Petitioners are two black employees of the United States Postal Service in the Florence, South Carolina facility, where no blacks had been promoted to any supervisory levels within a ten-year period. They brought this Title VII action alleging that the USPS refused to promote them because of their race. The Court of Appeals has affirmed the grant of summary judgment to the USPS based on the excuse that the employees failed certain tests. This case presents important questions regarding the type and quantity of evidence which a postal employee must present to create a triable issue as to the legitimacy of the promotion testing process as conducted and followed in that facility.

1. Can a black postal employee use statistical proof that no blacks had been promoted to upper levels in the local facility within a ten year period to help establish a prima facie individual disparate treatment claim under the McDonnell Douglas framework?

2. Can the USPS avoid trial on a Title VII failure to promote claim with the excuse that the black postal employee failed the MSS national test based on the testimony of its in-house "expert" who had exclusive control over the testing documents and the secret scoring process where the employee presents evidence that the white management at the local facility had the opportunity to manipulate the testing process and had circumvented the MSS process to promote white employees who did not even test in addition to statistical evidence that no blacks had been promoted to upper levels in the local facility within a ten-year period and an EEOC finding that his white supervisor intentionally discriminated against him on his evaluation?

3. Can the USPS avoid trial on a Title VII failure to promote claim with the excuse that the black postal employee failed a "test" where the "test" consisted of a series of questions personally developed by the white hiring supervisor and consisted of subjective questions not capable of "right" or "wrong" answers?

4. Can the USPS avoid trial on a Title VII failure to promote claim with the excuse that the black postal employee failed a "test" where the answers were not recorded and the white hiring supervisor's "scoring" comments and markings show unduly enthusiastic preference of the white candidate?

List of Parties

The Petitioners are James Williams, Jr. and Nathaniel Lockhart.

The Respondent is the Postmaster General of the United States Postal Service.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 1

1. Procedural History 1

2. Factual Background 2

The USPS Maintenance Selection System 3

The Florence Facility 5

Williams' Efforts to Promote through the MSS 7

Lockhart's Promotion Efforts 10

Reasons for Granting the Writ 12

I. The Court should grant certiorari because the Court of Appeals is allowing the USPS to avoid trial on Williams' Title VII failure to promote claim by conclusively crediting the excuse that the black postal employee failed a test and

rejecting as speculative circumstantial evidence which raises triable issues as to manipulation of the testing process by white supervisors in the local facility and the conclusiveness of that test in qualifying the employees for the promotion registers. 12

II. The Court should grant certiorari because the Court of Appeals is allowing the USPS to avoid trial on Lockhart's Title VII failure to promote claim by conclusively crediting the excuse that the black postal employee failed a "test" and rejecting as speculative circumstantial evidence which raises triable issues as to the objectivity and legitimacy of the "test" and the objectivity of the administration and scoring of the test. 19

Conclusion 22

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 12

Int'l Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) 17

McDonnell-Douglas Corp. v. Green,
411 U.S. 792 (1973) 11, 12, 13, 17

Senter v. General Motors Corp.,
532 F.2d 511 (6th Cir. 1976) 17

Spight v. Tidwell Indust., Inc.,
551 F. Supp. 123 (N.D. Miss. 1982) 19

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248 (1981) 11, 13

Wang v. Hoffman,
694 F.2d 1146 (9th Cir. 1982) 19

Statutes

42 U.S.C.A. § 2000e-2(h) 21

42 U.S.C. § 2000e-16(a) 1

James Williams, Jr. and Nathaniel Lockhart respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unofficially reported at 129 Fed.Appx. 806, and it also is set forth in the Appendix (App. 1). The opinion of the District Court is unreported and it is set forth in the Appendix (App. 15).

JURISDICTION

The opinion of the Court of Appeals was entered on April 27, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 717 of Title VII of the Civil Rights Act of 1964 provides that "[a]ll personnel actions affecting employees ... in the United States Postal Service ... shall be made free from any discrimination based on race." 42 U.S.C. § 2000e-16(a).

STATEMENT OF THE CASE

I. Procedural History

This action was initially commenced by nine African-American employees of the United States Postal Service ("USPS") as a class action against the Postmaster General of the USPS for denying them promotions because of their race, in violation of Title VII of the Civil Rights Act of 1964. The District Court refused to allow the action to proceed as a class action and granted summary judgment in favor of the

USPS on all claims.

As to Lockhart, the District Court held that while he may have established a prima facie case under the *McDonnell Douglas* framework, he failed to present sufficient evidence to rebut the USPS's proof that his scoring on a postal operations test was a nondiscriminatory reason for its decision not to promote him.[1] As to Williams, the District Court held that the he failed portions of the MSS written exam which preclude him from establishing that he is qualified and establishes a legitimate, non-discriminatory basis for his failure to be promoted.

The Court of Appeals for the Fourth Circuit affirmed, finding that the District Court properly refused to allow the case proceed as a class action and that four of the employees' claims were properly denied because they failed to exhaust their administrative remedies. As to the individual claims of these two Petitioners, the Court of Appeals held that they failed to present sufficient evidence from which a reasonable factfinder could conclude that they were denied a promotion on the basis of race.

2. Factual Background

The plaintiff employees, who are African American, are employees of the United States Postal Service in the Florence District. Williams is employed in the maintenance craft; Lockhart is a letter carrier in the distribution area. At various times during their employment with the USPS, they have applied for promotions and been denied or passed over based on their race.

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[1] The District Court also held that Lockhart had not exhausted his administrative remedies. However, the USPS conceded that he had, in fact, exhausted his remedies. [JA 1213; *See also* JA 250.]

The USPS Maintenance Selection System

The Maintenance Selection System (MSS) is the process the Postal Service uses to select the best qualified candidate for most postal maintenance positions. There are three types of applicants for these positions, and the process is different depending upon the type of applicant: entrance, incraft, or inservice.

Maintenance Craft Career Employees are given first priority in filling vacancies in the maintenance craft.[2] Incraft employees are given the opportunity to fill a vacant position based on their standing in the Promotion Eligibility Register (PER). That standing is determined by the results of their completion of the MSS process for the Group that includes that position.

According to the MSS Guidebook, there are seven steps in the incraft MSS Application process: (1) announcement, (2) application, (3) record review, (4) review panel evaluation, (5) examination, (6) supervisor evaluation, and (7) results. Although the review panel evaluation, written examination, and supervisor evaluation form the three-part substantive basis of the decision-making process.

After the Human Resources makes an announcement that the postal employee can apply for the Maintenance

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[2] There are four circumstances under which maintenance craft employees can apply to be included in a PER: (1) when first entering the maintenance craft; (2) when a facility announces a maintenance position newly authorized in that office; (3) when an employee transfers to another maintenance facility, or (4) when there is an official MSS Open Season in March, every three years.

Eligibility Register [Step 1], the employee submits an application and receives a CSA (Candidate Supplemental Application) book to provide their knowledge, skills, and abilities for each individual position requirement. When the employee completes and returns the CSA book, an Employee Maintenance Application (EMA) form is completed and is sent to the National Test Administration Center (NTAC) [Step 2]. At the NTAC, the forms are matched with records already in the database [Step 3], and NTAC sends back a list of the applicants and any components they already have on file, and then a review panel is conducted by the senior maintenance Manager or designee [who serves as chairman], a maintenance supervisor from the functional area, and a Human Resources Representative [Step 4]. The Panel review process is designed to evaluate the training, education, and experience attained and documented by the candidate as it relates to the KSA requirements of the position being evaluated.[3] The Review Panel members must not be the immediate supervisor of any applicant or the person who completed the supervisor's evaluation for any applicant who will be rated by that panel. The examinations must take place after the Review Panel Evaluations [Step 5]. The exams are conducted by NTAC-certified examiners according to the general rules and procedures disseminated by NTAC. Then the immediate supervisor completes the supervisor evaluation form which is reviewed and completed by the next higher level supervisor [Step 6]. The supervisors use a 1 to 5 rating scale, with 5 representing superior knowledge; however, the supervisors can give an employee a "CE" for "cannot evaluate" for any particular KSA.

The HR MSS Coordinator sends the panel review forms, examination and supervisor review forms to the NTAC for scoring. The results are returned to the district

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[3] They use a performance level scale of 5, 4.5, 4, 3.5, 3, 2.5, 2, 1.5 and 1

office and the applicant, and applicants who qualify are placed on the Register according to their rating [Step 7]. The applicants do not receive their actual test back showing which answers they missed; nor do they even receive a score on the written exam. Rather, they receive a KSA summary report listing all KSA's for each position for which the applicant have applied which simply identifies the KSA's which the applicant failed or those where he rated below average.

If an applicant is rated as ineligible, he can update failed KSAs if he first obtains additional education, training or experience relevant to the KSA which he wishes to update. Updating is not automatic; the local MSS Coordinator has the discretion to determine if the new or additional education, training or experience is relevant before allowing the update.

The Florence Facility

At the times in question, all the managers, examiners, trainers, and evaluators[4] in the MSS process within the Florence Facility were white. During a ten year period while those white people were in control of the MSS testing and evaluation process, no black maintenance workers were promoted to the upper levels in the Florence Facility. At the relevant time period, there were 40 workers in the maintenance craft during the relevant time frame of whom 15 were black males, 24 white males, and one white female.

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[4] Richard Barnhill, Maintenance Supervisor and MSS Coordinator; Charlie Cutter, Maintenance Manager; David Brandon, Maintenance Supervisor; David Black, Supervisor of Field Maintenance operation; James Stih, Human Resources manager; Myrtle Ann Gibbons, HR tester/trainer; Don Watford, "ad hoc" tester/trainer.

[JA 962.] However, there were only four blacks in the upper level positions (Maintenance Mechanic Levels 5 and 7, and Building Equipment Maintenance, and Electronics Technician). [JA 253.] Thus, while blacks constituted 37% of the workforce – only 10% held upper level positions – and of those where filled from outside; they were not promoted from the lower ranks in the Florence facility.

The Review Panel Evaluation Guidelines specify certain security controls which were not maintained by the MSS Coordinator[5] in the Florence District. The Guidelines mandate that:

- "Keep all materials pertaining to RPE questions under lock and key while in your possession when they are not in actual use." [JA 733.]

- "Keep in mind that one may have a tendency to inadvertently give an undue advantage to person supervised, taught, or merely talked to and who may receive the RPE interview containing some of the questions you have reviewed." [JA 733.]

- "Evaluation Guidelines must be maintained at all times. These Evaluation Guidelines must not be shown to anyone or discussed outside the panel sessions at any time without written permission of the Employee Relations Department. Compromising these Evaluation Guidelines reduces the integrity of the selection system." [JA 736.]

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[5] "It is the responsibility of the Human Resources Coordinator to ensure the accountability and confidentiality of the Review Panel and Supervisor Evaluation Guidelines." [JA 797.]

The Maintenance Selection System Coordinator's Guide – Trainer's Copy further provides that examination materials should be "stored under double lock and key: Double lock and key means that specified material must be stored in locked file and/or storage cabinets which are housed in a locked storage room or a secured locked storage area, in accordance with instructions in Personnel Handbook ..." Such materials include directions for conducting the exam, review panel guideline booklets, supervisor evaluation guideline booklets, oral instruction cassette tapes, sample questions, examination booklets. [JA 796.]

However, the Human Resources personnel in the Florence facility testified that these security requirements were violated. Stih acknowledged the "double lock and key" requirement, and testified that the materials are kept in a locked file cabinet locked in his office; however, he further testified that custodians have access to these confidential MSS materials because they keys to his office for cleaning and that the keys to the filing cabinet are kept in his unlocked desk drawer. [JA 649, 652, 655. *See also* JA 1137-38.]

Williams' Efforts to Promote through the MSS

After serving in the Army for 14 years, James Williams joined the USPS on September 3, 1993. He entered the Maintenance Division in the Florence Postal Facility, as an incraft worker/custodian – PS-3, and then he applied for the General Mechanic Register in November 1993. When he took the written exam in February 1994, he failed the Hand Tools KSA and the Applying Theory to Practical KSA; he also received a CE from his supervisor on those two KSAs. After several attempts to update, he was finally allowed to update these KSAs after taking a mechanics course offered by the local school district. [JA 962-998.]

The April 7, 1996 update had two components – the written exam and a supervisor evaluation. He received a final rating of "ineligible" based on a failed KSA No. 31 – Hand Tools. His supervisor claimed that he failed the KSA based on his written exam, but Williams claimed he failed the KSA because his supervisor (Brandon) had rated him as CE on use of hand tools supposedly because he had not observed Williams using hand tools. However, Brandon had supervised Williams for two years and had instructed Williams to assist other mechanics in assignments that required the use of hand tools. Yet, in contrast, Brandon was able to evaluate Mr. Barrentine and Mr. Bryan, white employees, within months or even weeks of their arrival. In an attempt to disclaim the impact of the patently unjustified CE, Brandon claimed that anyone can pass a KSA without a supervisory evaluation because the supervisory rating means nothing. [JA 975, 985.]

Williams timely filed a grievance, and the EEOC Administrative Judge found that while Brandon's explanation was not credible, his evaluation did not result in the ineligible rating – the written exam did. However, Williams appealed and the Commission found that the USPS's articulated reason for the supervisor's failure to rate Williams on the Hand Tools KSA was not worthy of belief and his failure to rate Williams constituted racial discrimination.[6] [App. 74.]

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[6] The Commission ordered the agency to reevaluate Williams with information from coworkers and agency officials other than the supervisor, and also directed the USPS to consider taking disciplinary action against the supervisor.

Williams also presented evidence that white employees were promoted over African American employees. Specifically, Joe Barrantine entered the USPS as a custodian in April 1995, immediately applied for PS-5 maintenance mechanic, and within 3 months Brandon evaluated him on all elements (no score lower than a 3). Likewise, David Bryan came to the Florence Facility in October 1995; Brandon evaluated him the next month on all elements (no score lower than 2). [JA 964.]

Lockhart's Promotion Efforts

Nathaniel Lockhart has worked for the USPS for twenty years. He entered the distribution class in the Florence Postal Facility in 1987 as a city carrier – level 5. Since that time he has obtained a BA in 1987 from Limestone in Business Administration and Masters degree from Webster University in Human Resources and Management in 1994; and completed numerous training programs offered for mail distribution employees. He has sought numerous promotions to supervisory positions, but repeatedly denied, despite glowing recommendations and this plethora of experience. In fact, it has been ten years since a black employee has been promoted to a supervisor position in the distribution area of the Florence facility and he had to file an EEO complaint to attain that promotion. [JA 930-33, 310, 466.]

Lockhart applied for an entry level supervisory position as an EAS 16 Customer Service Supervisor in the Greenwood Post Office. The promotion process in the distribution area is not governed by the MSS process described above. Rather, in striking contrast, this process is based in large part on subjective criteria applied by a number of different individuals involved in the process. When a vacancy is announced, an applicant submits a Form 991 job application which is reviewed by a three-person committee

that recommends applicants for an interview process. The Selecting Official reviews the recommended applications, conducts an interview, and makes the ultimate selection decision. [JA 265.]

Lockhart submitted a Form 991 for an entry level supervisory position as an EAS 16 Customer Service Supervisor in the Greenwood Post Office, but he was rejected in favor of a white, male candidate.

The review committee recommended Lockhart for the Greenwood position along with two other applicants – Mary Clemmons (a white female) and Edward Dixon (a white male). [JA 265.] These three candidates were interviewed by Postmaster Steve Glinski, a white male, who – unsurprisingly -- selected the white male candidate.

During those interviews, Glinski utilized a series of 61 questions he had personally developed supposedly to understand each candidate's knowledge of the basics involving supervision of mail processing, retail operations, and delivery/collection of mail. [JA 265.] Glinski testified, and the Magistrate found, that he "recorded" the answers, and that Lockhart answered 44.3% of the questions correctly, while Dixon[7] supposedly answered 96.7% of the questions correctly. However, a review of the questions reveals that the questions are not all objective or capable of "right" or "wrong" answers.

For example, Glinski asked them how many sick leave hours they had and why they did not have more. He asked what kind of management style they used. He asked other "questions" which included scenarios that required

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[7] Dixon had only 11 years of service in the USPS, compared to Lockhart's 23 years. Dixon had a BA in Business, compared to Lockhart's Masters' degree.

open-ended responses; on these, Glinski "graded" Dixon subjectively as "very good" or "excellent!", however, he did not note any such "qualitative" description of Lockhart's responses. Notably, he asked Lockhart an additional question (not on the typed list) about the operations at Greenwood – a question only Dixon could reasonably have been expected to answer. [JA 346-53.]

Also, the "answer sheets" (on which Glinski supposedly "recorded" the answers and scores) do not contain the applicants' answers to all the questions. In many instances, Glinski simply wrote "yes" or "no" rather than the applicant's answer.

REASONS FOR GRANTING THE WRIT

This case concerns important questions regarding the ability of a postal employee to survive a motion for summary judgment and present a triable issue of racial discrimination under Title VII where the USPS has exclusive and secret control of the testing process. In accepting the testimony of the USPS's witnesses and rejecting all the evidence presented by the employees as inappropriate or speculative, the Court of Appeals has imposed a heightened evidentiary standard which is incompatible with this Court's McDonnell-Douglas[8] framework for indirect evidence.

This Court has recognized that employers will not ordinarily admit to employment discrimination and direct proof rarely exists or is discernable. The Fourth Circuit's evaluation and analysis of the evidence in this case amounts

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[8] *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973), and followed in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

to a requirement of a quantum and quality of "direct" evidence which cannot be reconciled with *McDonnell-Douglas* and its progeny, and amounts to a weighing of the evidence in a manner inconsistent with Rule 56 and applicable precedent in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

Accordingly, there are serious, compelling reasons for this Court to grant the petition and once again re-emphasize the appropriate standard for evaluating Title VII claims so that these Petitioners are afforded their due right to present their evidence to a factfinder to consider the veracity and probativeness of the USPS's excuses for refusing to promote them.

I. The Court should grant certiorari because the Court of Appeals is allowing the USPS to avoid trial on Williams' Title VII failure to promote claim by conclusively crediting the excuse that the black postal employee failed a test and rejecting as speculative circumstantial evidence which raises triable issues as to manipulation of the testing process by white supervisors in the local facility and the conclusiveness of that test in qualifying the employees for the promotion registers.

Summary judgment is appropriate when, considering the parties' burdens of proof at trial, there is "no genuine issue of material fact" and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party.

In Title VII cases, the application of the summary judgment standard involves the application of the *McDonnell Douglas* framework. To prove a *prima facie* case of

disparate treatment/discriminatory refusal to promote, a plaintiff must prove that "(1) plaintiff is a member of a protected group; (2) plaintiff applied for the position in question; (3) plaintiff was qualified for the position; and (4) plaintiff was rejected for the position under circumstances giving rise to an inference of unlawful discrimination." The employer may rebut it by producing some evidence that it had a legitimate, nondiscriminatory reasons for the decision, then the employee/applicant carries the burden of producing that the employer's reasons were a pretext. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 (1981).

Under this legal framework, the Court of Appeals held that Williams failed to establish that he was qualified for the position he sought. Despite evidence – as found by the federal EEOC Commission -- that his supervisor had intentionally discriminated against Williams in his evaluation,[9] the Court of Appeals held that Williams failed to introduce evidence that, but for the allegedly discriminatory reviews given by his supervisors or the review panel, he would have met all of the KSAs required for the promotions he sought. In so holding the Court of Appeals, as did the District Court, accepted the testimony of NTAC manager who testified that Williams scored so low on an examination for at least one necessary KSA that he could not have passed the KSA even had he received the highest supervisor or panel review possible: "Because the USPS uses the KSAs to determine whether candidates are qualified for particular positions, the fact that the plaintiffs would not have passed

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[9] The Court of Appeals failed to even acknowledge this EEOC finding and ignored its significance and probativeness by independently and rejecting Williams's claim that certain management officials within the Florence facility had the motive and opportunity to manipulation the KSA testing procedure.

the necessary KSAs, even in the absence of any discriminatory reviews, establishes that they were not qualified for the positions for which they applied." [App. 11; 129 Fed.Appx. at 813-14.]

In granting summary judgment to the USPS based on the NTAC manager's testimony, the Court of Appeals exceeded the scope of its Rule 56 purview by accepting his testimony as true and dispositive despite the fact that he contradicted his deposition testimony in this case during his trial testimony in a related case of discrimination arising out of the same Florence facility.

The USPS's core defense relies upon the NTAC representative's declaration that "the plaintiffs failed the written examination because of their low scores." The USPS's NTAC "expert" representative, James Mahoney,[10] declared that the MSS scoring systems are maintained is strict confidence, and he is one of only few who have access to and understand the scoring process and procedures. He declared that he had obtained the Plaintiff Williams' MSS records and ran them through his computer system, and as a result of his review, he declared that Williams failed his KSA based solely on his test scores, and that he could not have passed the KSA with even the highest evaluation ratings. [JA 258-62.] However, the Plaintiff had no access to the records or the NTAC computer program and could not directly challenge his testimony.

On a basic level, it defies logic and fundamental fairness that USPS's excuse should be conclusively accepted based on the testimony of an "expert" who had exclusive

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[10] Mahoney was Manager of the NTAC from 1988 to 2000; he wrote the MSS handbook and testing rules; and he developed the software algorithms. [JA 252.]

control over not only the MSS documents, but also the secret scoring process. However, the Court of Appeals' holding is even more incomprehensible and irreconcilable with Rule 56 standards in view of the fact that Williams was able to present evidence wherein Mahoney contradicted his own testimony.

Contrary to the proposition that Williams' test score was so low that the evaluations could not have had any impact, Mahoney had admitted that the examinations are not scored individually. [JA 255.] Likewise, during a related trial[11], Mahoney again testified that the "examinations aren't scored independently:"

> [T]he score is a result of all the components taken together, and we don't score the components individually. We would never say a person was deficient in one or the other components. You can be deficient in the sense that you didn't pass a KSA, once all the components are added together, but beyond that, ***we don't go back and analyze what the effect of an individual component was."***

[JA 1397, 1398.] This directly refutes his own testimony and is sufficient evidence to raise a genuine issue of material

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[11] Griffin v. Henderson, C/A No. 4:99-1782-22F. That plaintiff's claim of age discrimination in the same Florence Facility was tried before the same District Judge on December 18-20, 2003, shortly prior to the summary judgment motion hearing in this case. At the Griffin trial, the District Judge noted that the evidence would overlap in both cases. [JA 1472.] In addition, the USPS asked the District Court to take judicial notice of the Griffin trial testimony at the summary judgment hearing in this case. [JA 1274.]

fact as to whether the test disqualified Williams or if the test as just a pretext.

Clearly, the Court of Appeals simply ignored this conflicting testimony from Mahoney himself that the USPS's excuse is unfounded and a mere pretext. Moreover, at best, Mahoney's testimony is predicated on an assumption that the testing was fairly and properly conducted. An assumption that was incorrectly accepted by the Court of Appeals in the face of admissions from the USPS' own management personnel that the testing process in the Florence facility was susceptible to tampering and manipulation.

The Court of Appeals also considered, discredited and rejected the evidence submitted by Williams that certain management officials within the Florence facility had the motive and opportunity to manipulate the KSA testing procedure. Contrary to the Court of Appeals analysis of the evidence, Williams did not just "suggest that white employees *might* have had access to testing materials prior to taking the exams." Testimony elicited from the USPS's own personnel established that the mandatory security procedures were not maintained and the white supervisors in the Florence facility had access to the testing materials. That evidence combined with the evidence that, at least one of those supervisors had intentionally manipulated his evaluation of Williams because of his race, is sufficient to create a triable issue for the factfinder.

The Court of Appeals also overlooked and/or improperly rejected evidence of promotions outside of the strict parameters of the MSS process which created a permissible inference of pretext. Specifically, Joe Barrantine was promoted without complying with the MSS incraft promotion process. Notably, Barrantine was given a supervisor's evaluation (avoiding a "CE") based on a special interview convened by Brandon – the same supervisor who

intentionally manipulated the "CE" on Williams' evaluation. [JA 1313-14.]

Finally, the Court of Appeals ignored or rejected the statistical evidence that no black maintenance workers had been promoted to the upper levels in the Florence facility in a ten-year period. In doing so, the Court of Appeals has ignored this Court's repeated pronouncements that statistical evidence is relevant to prove disparate treatment. In *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n. 20 (1977), the Court stated that: "Since the passage of the Civil Rights Act of 1964, the courts have frequently relied upon statistical evidence to prove a violation ... in many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer." *See also* McDonnell-Douglas, 411 U.S. at 805 (statistics can be probative of whether the alleged disparity is the result of discrimination; including statistics in list of evidence available to plaintiff to show pretext).

The Fourth Circuit's error in this regard and its significance is highlighted by this commentary from the Sixth Circuit:

> Statistical evidence is an important tool for placing seeming in-offensive employment practices in their proper perspective. Proof of overt racial discrimination is seldom direct. An employee is at an inherent disadvantage in gathering hard evidence of employment discrimination, particularly when the discrimination is plant-wide in scope. It is for this reason that we generally acknowledge the value of statistical evidence in establishing a prima facie case of discrimination under Title VII.

Senter v. General Motors Corp., 532 F.2d 511, 527 (6th Cir. 1976).

It appears that the Court of Appeals may have rejected the statistical evidence because the class was not certified, *see footnote* 2 [App. 11]. However, the court did not fully appreciate the purpose for which Plaintiff offered this evidence. Williams did not challenge the MSS national test or the MSS process as creating a disparate impact. Rather, Williams submitted evidence that the white supervisors in Florence had found ways to manipulate and circumvent that process to prevent black maintenance workers from promoting up through the upper ranks. Williams submits that the fact that no blacks had been promoted in ten years is such a stark, gross disparity that it constitutes probative evidence – together with the other circumstantial evidence – that the KSA failure was a fabrication or pretext for intentional discrimination in denying him a promotion because of his race. The Court's rationale for disregarding this evidence was, consequently, misplaced and unjustified under settled precedent established in McDonnell-Douglas, and Hazelwood.

Rarely will an employee find any "smoking gun," direct evidence of overt racial discrimination. In most cases, the plaintiff employee will have to build a case based on circumstantial evidence. In this case, Williams had the USPS expert contradict himself on the effect of failing the KSAs, an EEOC finding that the local supervisor had intentionally discriminated against him in manipulating the evaluation, along with the striking, gross statistical evidence that no black had been promoted to the upper levels of the Florence facility for a ten-year period.

The Court of Appeals rejected all of the circumstantial evidence presented by Plaintiff Williams as "speculative" without proper consideration of the Rule 56 and McDonnell Douglas standards. This Court should grant

certiorari to clarify the proper assessment and evaluation of "testing" evidence used by employers to justify and insulate their promotion/hiring decisions from Title VII claims, and reaffirm the available use of circumstantial evidence (including statistics) in a proper application of the McDonnell Douglas framework.

II. The Court should grant certiorari because the Court of Appeals is allowing the USPS to avoid trial on Lockhart's Title VII failure to promote claim by conclusively crediting the excuse that the black postal employee failed a "test" and rejecting as speculative circumstantial evidence which raises triable issues as to the objectivity and legitimacy of the "test" and the objectivity of the administration and scoring of the test.

The promotion process that Lockhart attempted to matriculate through is much more subjective than the MSS process and, thus, more susceptible to discrimination. *See Spight v. Tidwell Indust., Inc.,* 551 F. Supp. 123, 133 (N.D. Miss. 1982) (promotion policy based upon predominantly subjective criteria applied by all-white supervisory staff without written guidelines offered opportunity to discriminate because of race that "renders the decision-making process suspect as a ready mechanism for discrimination"); *Wang v. Hoffman*, 694 F.2d 1146, 1149 (9th Cir. 1982) ("The use of subjective criteria is a selection system is not enough of itself to violate Title VII. However, courts have expressed concern over the use of subjective criteria where there is evidence that the criteria furthered bias or discriminatory classifications.")

While couched in terms of "may," the Court of Appeals acknowledged that Lockhart established a prima facie case under the *McDonnell Douglas* framework, but found that he did not present sufficient evidence to rebut the

USPS's proof that it had a nondiscriminatory reason for its decision not to promote him. The Court of Appeals found that USPS met its burden of producing evidence of a nondiscriminatory reason for not denying him the supervisor position at Greenwood based on the testimony of Glinski, the postmaster responsible for making the final promotion decision at the Greenwood facility. Glinski testified that he chose the white candidate over Lockhart because the white employee performed better on a "test" that Glinski has personally developed and used during his interviews. Thus, in Lockhart's claim, the USPS once again sought to avoid examination of its promotion decision and hide behind the excuse that the employee "failed" a "test."

Again, in the absence of some "smoking gun" admission or other direct evidence that Glinski refused to hire him because of his race, Lockhart had to rely on circumstantial evidence to prove his claim that this reason for denying him the position at the Greenwood facility was pretextual. In many cases, a rejected employee may have nothing on paper regarding a hiring or promotion decision. In this case, the "tests" form the basis of the circumstantial evidence which creates a triable issue as to the legitimacy of Glinski's asserted non-discriminatory reason for hiring the white candidate instead of Lockhart.

The "test" upon which the USPS seeks to justify the promotion decision was not any type of standard, uniform examination developed or administered by the central USPS administration. Rather, it was a list of questions made-up by the local supervisor, administered by him, and graded by him. The test did not include just objective questions capable of "right" or "wrong" answers, but also subjective questions incapable of independent scoring/measurement. The tests are also unreliable and can support a reasonable finding of racial bias because, for the most part, Glinski did not record the actual answers given by the candidates; rather,

he made "yes" and "no" notations.

The Court of Appeals rejected this evidence as insufficient to enable a reasonable factfinder to conclude that Lockhart was discriminated against, by blindly accepting Glinski's "scoring:"

> First, the proportion of subjective questions asked during the interviews was too small to account for the vast discrepancy between the interview scores of Lockhart and the other applicant--44.3% correct versus 96.7% correct. Second, the fact that Glinski did not specifically record the candidates' interview answers does not tend to show that he lied about their performances or that he ultimately chose the white candidate over Lockhart because of Lockhart's race.

[App. 13, 129 Fed.Appx. at 815.]

Glinski's questionnaires simply should not be treated as the type of professionally developed objective testing contemplated by Section 2000e-2(h).[12] Unlike the MSS national testing, there is no independent, objective standard to establish the validity or relevance of the questions. Nor is their evidence of any "answer key" to measure Glinski's "yes" and "no" scoring.

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[12] As provided in 42 U.S.C.A. § 2000e-2(h), it is not "an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test ***provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.***"

Perhaps the most compelling circumstantial evidence found is found on the "tests" in Glinski's grading notations. Apart from marking the white candidate's answers as correct, he added flamboyant, superlative comments such as "very good" or "excellent!" However, he did not note any such "qualitative" description of Lockhart's responses. Notably, he also asked Lockhart an additional question (not on the typed list) about the specific operations at Greenwood – a question only the white candidate could reasonably have been expected to answer. [JA 346-53.]

In accepting Glinski's tests and scoring on his testimony alone, the lower courts have credited the USPS's explanations and excuse's under questionable circumstances and rejected the black employee's claims as speculation. The Court should grant certiorari to clarify the proper assessment and evaluation of "testing" evidence used by employer's to justify and insulate their promotion/hiring decision from Title VII claims, and reaffirm the available use of circumstantial evidence (including statistics) in a proper application of the McDonnell Douglas framework.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners

July 26, 2005

APPENDIX

United States Court of Appeals
Fourth Circuit

James WILLIAMS, Jr.; Jimmy E. McKelvy; James Gilchrist; Bobby Lacy; Robert McKithen, Jr.; Kevin McKie; Robert Cooks, Jr.; Edward N. Gray; Nathaniel Lockhart, on behalf of themselves and all others similarly situated,
Plaintiffs--Appellants,
v.
William J. HENDERSON,
Postmaster General United States Postal Service,
Defendant--Appellee,
and
Richard E. Barnhill; David O. Brandon; Charles J. Cutter, II; Emma Oliver; Penny Joye; Sonny Powell; John A. Frye; James Stih; Ronald Hopson; David Black, Defendants.

No. 03-2260.

Argued Feb. 3, 2005.
Decided April 27, 2005.

Appeal from the United States District Court
for the District of South Carolina, at Florence.
Terry L. Wooten, District Judge. (CA-99-552-4-25- BH).

ARGUED: Deborah Harrison Sheffield, Columbia, South Carolina, for Appellants. David George Karro, United States Postal Service, Washington, D.C., for Appellee. **ON BRIEF:** J. Strom Thurmond, Jr., United States Attorney, Barbara Murcier Bowens, Assistant United States Attorney, Columbia, South Carolina; Lori J. Dym, Managing Counsel, United States Postal Service, Washington, D.C., for Appellee.

Before WILKINSON, NIEMEYER, and WILLIAMS, Circuit Judges.

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM.

Nine African-American employees of the United States Postal Service ("USPS") commenced this class action against the Postmaster General of the USPS for denying them promotions because of their race, in violation of Title VII of the Civil Rights Act of 1964. On the USPS's motion, the district court ruled that this action could not proceed as a class action and, with respect to the individual plaintiffs' claims, granted summary judgment in favor of the USPS.

On appeal, we affirm. We agree with the district court's decision that this case should not proceed as a class action. And with respect to the individual defendants, we agree that none of the employees presented sufficient evidence from which a reasonable factfinder could conclude that the employee was denied a promotion on the basis of race. Finally, we agree that four of the employees' claims must be denied also because they failed to exhaust their administrative remedies.

I

Plaintiffs Williams, McKelvy, McKie, Cooks, Lacy, and Gray work in the maintenance craft in the Florence, South Carolina mail processing facility of the USPS. [FN1] Plaintiff Lockhart works as a mail distributor at the same facility. All plaintiffs claim that the USPS denied them promotions or discouraged them from seeking promotions because of their race.

FN1. Although plaintiffs Gilchrist and McKithen, who also work in the maintenance craft at the Florence facility, filed notices of appeal, neither has prosecuted his appeal. Accordingly, we dismiss their appeals.

The USPS promotion process in the maintenance craft is a highly formalized one. To obtain a promotion within that craft, a postal employee must enter the USPS's "Maintenance Selection System," which is comprised of seven steps: (1) announcement, (2) application, (3) record review, (4) review panel evaluation, (5) examination, (6) supervisor evaluation, and (7) results. While the first two steps might involve various circumstances, they generally entail the applicant's submission to the USPS of information pertaining to his or her qualifications for a desired position. During step (3), the USPS's National Test Administration Center ("NTAC") receives and processes the forms submitted by the applicant and any relevant records already contained in the USPS's database. Step (4) consists of an interview and record review by a three-member review panel, which assesses the applicant's qualifications for the job sought. Those qualifications are described by "KSAs" (knowledge, skills, and abilities) that the applicant must possess to be considered for the position. For each relevant KSA, the review panel assigns a score to the applicant, with 1 being the worst score and 5 being the best. During step (5), the applicant takes a written examination, administered by the NTAC for each relevant KSA. Step (6) requires the applicant's current supervisor to submit a written evaluation for each of the relevant KSAs. The supervisor can either assign the applicant a performance level score of 1 to 5 or, if the supervisor has no basis on which to make an evaluation, the supervisor can give the applicant a "CE" score (standing for "cannot evaluate"). Finally, during step (7), the NTAC combines the applicant's scores from steps (4) through (6)

and returns the results to the USPS office and the applicant. The applicant never sees how he or she scored on the individual components in the evaluation process. The applicant does, however, receive an overall score for each KSA, which is arrived at by combining the applicant's scores from the test, the panel review, and the supervisor evaluation in accordance with a formula. To be eligible for the desired position, the applicant must have achieved an overall passing score for each relevant KSA. If the applicant has failed one or more KSAs, he can seek to be re-evaluated only if he has received new experience or training that might make him more qualified.

Promotions in the distribution craft, as distinct from the maintenance craft, are handled through a less formalized procedure than those in the maintenance craft. The applicant must submit a job application listing his knowledge, skills, and abilities for the desired position, and the application is then forwarded to a review committee, which selects the most qualified applicants to interview for the position.

Plaintiffs Williams and McKelvy both applied in April 1996 for promotions within the maintenance craft to the position of general mechanic but were turned down when they failed to achieve passing scores on relevant KSAs. Both men allege that their non-passing KSAs were the result of discriminatory evaluations written by their supervisor, David Brandon. Specifically, both men received a CE score on the hand tools KSA from Brandon and ultimately received an overall "ineligible" rating for that KSA. Williams and McKelvy both allege that Brandon had previously observed them using hand tools and even had acknowledged their competency with hand tools in the past. They maintain that Brandon was motivated by racial animus to withhold a favorable evaluation. But James Mahoney, the manager of the NTAC, testified that both Williams and McKelvy received such low scores on the written examination for hand

tools that they could not have passed the hand tools KSA even if they had received the highest supervisor review possible.

Plaintiff Cooks applied for a promotion within the maintenance craft in January 1994 but was deemed ineligible when he failed the KSAs for applied theory and test equipment. Cooks blames his overall ineligibility rating on the allegedly discriminatory evaluations he received from his supervisor, Richard Barnhill, and the review panel. Barnhill gave Cooks a CE on the applied theory KSA, and the review panel gave him a rating of 1 on the test equipment KSA. According to NTAC manager Mahoney, Cooks's scores on the written examination for applied theory and test equipment were so low that Cooks could not have passed those KSAs even if he had received the highest possible supervisor and review panel scores.

Plaintiff Lacy alleges that he was denied a promotion because of Barnhill's discriminatory conduct. In particular, the USPS denied Lacy's request to be promoted to building equipment mechanic or area maintenance technician after he had failed nine relevant KSAs. Lacy claims that his overall non-passing scores on those KSAs resulted from the low scores he received from the review panel, which, according to Lacy, was conducted by Barnhill in a discriminatory manner. Notwithstanding Lacy's low panel review scores, however, NTAC manager Mahoney testified that Lacy's written test scores for two of the KSAs were so low that no review panel evaluation would have been high enough for him to have passed.

Plaintiff Gray never actually entered the maintenance selection system. He alleges that he was discouraged from applying for a promotion by his supervisor Barnhill.

Plaintiff McKie was denied a promotion in the maintenance craft, not because he failed a relevant KSA, but because he was passed over in favor of another qualified employee who was white. A contributing factor in the decision to promote the white employee was the difference between the supervisor evaluations each applicant received from Barnhill. McKie alleges that because Barnhill was not familiar enough with the white applicant's abilities to have properly compared the two, the disparity in their applications must have been caused by racial animus.

Unlike the other plaintiffs who sought promotions in the maintenance craft, Lockhart sought a promotion in the mail distribution craft to the position of customer service supervisor. He applied to both the Taylor and Greenwood post offices. The review committee at the Taylor facility did not select Lockhart as a finalist, but he was granted an interview for the position at the Greenwood facility. Along with two other candidates, Lockhart was interviewed by postmaster Steve Glinski. During the interviews, Glinski asked 61 questions, and after scoring each applicant according to his or her responses, offered the position to a white applicant. Although Lockhart answered only 44.3% of the interview questions correctly, while the chosen candidate scored 96.7%, Lockhart claims that Glinski allowed racial animus to color his evaluation of the applicants' answers.

The plaintiffs commenced this action contending that the USPS discriminated against them in denying them promotions, in violation of Title VII. Their complaint requests both injunctive relief and monetary damages.

On cross-motions for summary judgment, the district court ruled that the case could not proceed as a class action because the numerosity requirement of Rule 23 was not met, and, with respect to each individual plaintiff, the court granted summary judgment in favor of the USPS.

II

At the outset, we address the district court's ruling that this case could not proceed as a class action because the plaintiffs failed to demonstrate that the class was "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1).

The plaintiffs proposed to represent a class consisting of "[t]hose employees of the maintenance craft at the Florence Mail Processing Facility of African-American extraction who have applied for and been denied promotions based upon their race." The plaintiffs presented evidence that eight individuals fell within the class so defined. We conclude that the district court did not abuse its discretion in concluding that such a small number of potential class members was insufficient to maintain a class action under Federal Rule of Civil Procedure 23. *See* 7A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure* § 1762 (2d ed.1986) (observing that, although there is no bright-line rule for how many members a class must have, many courts have found that classes with fewer than thirty members do not justify a class action); *see also Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n,* 375 F.2d 648, 653 (4th Cir.1967) ("[U]nless an abuse is shown, the trial court's decision on this issue [of numerosity] is final").

III

Next we address the USPS's contention that several plaintiffs failed to exhaust their administrative remedies. Plaintiffs Cooks, Gray, and McKie never filed complaints with the Equal Employment Opportunity Commission ("EEOC"), and although plaintiff Lacy filed a timely EEOC complaint, he failed to file a complaint in federal court

within 90 days after the EEOC found no evidence of discrimination, as required by 42 U.S.C. § 2000e-16(c).

While the plaintiffs do not deny such failures, they contend that the USPS should be equitably estopped from asserting them as a defense. Specifically, the plaintiffs claim that the USPS's EEOC representative failed to tell three plaintiffs who did file EEOC complaints--Williams, McKelvy, and Gilchrist--that they could pursue a class complaint before the EEOC under 29 C.F.R. § 1614.204. The EEOC representative allegedly told them only that "each case had to be filed individually." But this fact, even if true, does not permit the plaintiffs to avoid the administrative process, and they offer no evidence that they were misinformed about or thwarted in filing individual EEOC complaints. Although a class complaint filed before the administrative agency might, in certain circumstances, have preserved their claims as class members, no one in this case made any effort to pursue a class complaint before the EEOC, either timely or otherwise. Any misinformation provided by the EEOC would at most have tolled the time for filing a class complaint; it would not have excused the plaintiffs from having to exhaust their administrative remedies altogether. Moreover, they did not demonstrate any qualifications to pursue a class complaint before the EEOC. Without anything having been presented to the EEOC about a class proceeding, it would be inappropriate for us now to consider the issue as a basis to recognize the plaintiffs' claim that equitable estoppel should apply.

The plaintiffs argue that even if equitable estoppel does not save their claims, they can piggyback their unexhausted claims on the claims of the other plaintiffs who satisfied the exhaustion requirement--Williams, McKelvy, and Lockhart. While it is not clear that the plaintiffs who failed to exhaust their administrative remedies have claims that are similar enough to the claims of the three employees who exhausted

their claims that they could invoke a single-filing rule, we conclude that any such rule would in any event conflict with the EEOC's procedure established for class complaints against the government and therefore decline to apply such a rule in the circumstances of this case. To allow plaintiffs who have not exhausted their administrative remedies to piggyback on EEOC complaints brought by others who are similarly situated would subvert the purpose behind the class administrative procedure available to federal employees. That procedure enables federal employees to preserve the claims of others while putting the government on notice that it will have to defend itself against a wider array of claims. The single-filing rule that the plaintiffs urge us to apply fails to provide such notice and serves no purpose that the class administrative process does not serve equally well.

Finally, the plaintiffs contend that they need not exhaust their administrative remedies so long as a class representative in the federal action has exhausted his administrative remedies. *See Chisholm v. U.S. Postal Serv.*, 665 F.2d 482, 490 n. 11 (4th Cir.1981) (holding that plaintiffs who file timely individual EEOC complaints can subsequently file class action lawsuits on behalf of similarly situated plaintiffs who have not exhausted their administrative remedies). Of course, that defense is not available if the federal action is not maintainable ***813** as a class action. As we have pointed out, the district court did not abuse its discretion in holding that a purported class of eight members is not sufficiently large to invoke Federal Rule of Civil Procedure 23 authorizing class actions.

Accordingly, we affirm the district court's ruling granting summary judgment to the USPS on the claims of Cooks, Gray, McKie, and Lacy because they failed to exhaust their administrative remedies.

IV

Finally, we address the plaintiffs' challenges to the district court's rulings on the merits. The district court concluded that none of the plaintiffs, including those who failed to exhaust their administrative remedies, presented sufficient evidence from which a reasonable factfinder could conclude that they had been discriminated against on the basis of their race. We agree.

Section 717 of Title VII of the Civil Rights Act of 1964 provides that "[a]ll personnel actions affecting employees ... in the United States Postal Service ... shall be made free from any discrimination based on race." 42 U.S.C. § 2000e-16(a). Relying on this section to assert disparate treatment claims, the plaintiffs alleged that the USPS failed to promote them because of their race. In response to the USPS's motion for summary judgment, they invoked the *McDonnell Douglas* framework for determining discrimination. [FN2] Under that approach, each plaintiff must demonstrate (1) that he is a member of a protected group; (2) that he applied for the position in question; (3) that he was qualified for the position sought; and (4) that he was rejected for the position in favor of someone not a member of the protected group in circumstances giving rise to an inference of unlawful discrimination. *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir.1998), *vacated on other grounds*, 527 U.S. 1031, 119 S.Ct. 2388, 144 L.Ed.2d 790 (1999). Once the plaintiff has satisfied those criteria and thereby established a prima facie case, a presumption of discrimination arises, and "the burden of production shifts to the employer to rebut the plaintiff's prima facie case by articulating a legitimate, non-discriminatory reason for the adverse employment action." *Id.* If the employer produces evidence of a non-discriminatory reason for the promotion decision, then the presumption of discrimination "drops from the case," and the plaintiff bears the "ultimate burden of

persuading the court that [he] has been the victim of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 255 n. 10, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). With this legal framework, we now turn to the plaintiffs' claims.

> FN2. Part of the plaintiffs' complaint could also be understood to be alleging a "pattern or practice" of discrimination. Because pattern or practice claims can be asserted only in class actions, *see Lowery v. Circuit City Stores, Inc.,* 158 F.3d 742, 761 (4th Cir.1998), *vacated on other grounds,* 527 U.S. 1031, 119 S.Ct. 2388, 144 L.Ed.2d 790 (1999), we do not address that part of their complaint in view of our ruling made above on the class action status of this case.

A. Williams, McKelvy, Cooks, Lacy

Plaintiffs Williams, McKelvy, Cooks, and Lacy failed to establish that they were qualified for the positions they sought, the third element of a prima facie claim of discrimination. Specifically, they failed to introduce evidence that, but for the allegedly discriminatory reviews given by their supervisors or the review panel, they would have met all of the KSAs required for the promotions they sought. The NTAC manager testified that each of these plaintiffs scored so low on an examination for at least one necessary KSA that he could not have passed the KSA even had he received the highest supervisor or panel review possible. Because the USPS uses the KSAs to determine whether candidates are qualified for particular positions, the fact that the plaintiffs would not have passed the necessary KSAs, even in the absence of any discriminatory reviews, establishes that they were not qualified for the positions for which they applied.

Attempting to prove that the KSA examination procedure itself was a pretext for discrimination, the plaintiffs suggest that white employees *might* have had access to testing materials prior to taking the exams. They also attempt to undermine the credibility of NTAC manager Mahoney's testimony that the plaintiffs' exam scores were so low that they could not have passed the necessary KSAs by asserting that the scoring process was "shrouded in secrecy." These arguments are, however, mere speculation and do not create a triable question of fact. *See Ennis v. Nat'l Ass'n of Bus. and Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir.1995) ("Mere unsupported speculation ... is not enough to defeat a summary judgment motion").

B. Gray

Plaintiff Gray failed to establish that he applied for the position in question, the second element of a prima facie case of discrimination. In an unsuccessful attempt to overcome that failure, Gray alleges that he intended to apply for a level-5 maintenance position in March 1998 but changed his mind when his supervisor, Richard Barnhill, told him that no level-5 positions would be open in the near future. Not only does Gray fail to offer any proof that Barnhill's statement was untrue, but even if untrue, he fails to point to any evidence that Barnhill intentionally misled Gray because of his race. Gray simply has not advanced evidence necessary to support a prima facie case for Title VII discrimination.

C. McKie and Lockhart

While both McKie and Lockhart may have established a prima facie case under the *McDonnell Douglas* framework, neither has presented sufficient evidence to rebut the USPS's proof that it had a nondiscriminatory reason for its decision not to promote him.

Specifically, the USPS asserts that McKie was passed over in favor of a white applicant because Barnhill's evaluation of the two applicants reflected the fact that the white applicant had background experience in the electronics field, which made him a better candidate for the position. While McKie notes that Barnhill did not have much of an opportunity to observe either applicant on the job, McKie has not presented any evidence that it was against USPS policy for supervisors to take into account an applicant's background experience when evaluating him. Even though McKie may have possessed the skills *necessary* for the position, that fact does not undermine the USPS's conclusion that the other applicant possessed *superior* skills.

Similarly, the USPS met its burden of producing evidence that Lockhart was denied supervisor positions at the Greenwood and Taylor facilities for legitimate reasons. Glinski, the postmaster responsible for making the final promotion decision at the Greenwood facility, testified that he chose the white candidate over Lockhart because the white employee performed better during his interview. To support his claim that this reason for denying him the position at the Greenwood facility was pretextual, Lockhart points to the subjective nature of some of the interview questions and notes that Glinski did not actually record the candidates' answers. But such evidence, even when combined with Lockhart's prima facie case, would not enable a reasonable factfinder to conclude that Lockhart was discriminated against. First, the proportion of subjective questions asked during the interviews was too small to account for the vast discrepancy between the interview scores of Lockhart and the other applicant--44.3% correct versus 96.7% correct. Second, the fact that Glinski did not specifically record the candidates' interview answers does not tend to show that he lied about their performances or that he ultimately chose the white candidate over Lockhart because of Lockhart's race.

Explaining the decision not to interview Lockhart for the position at the Taylor facility, one of the review panel members testified that, based on the candidates' applications, Lockhart was less qualified than five other applicants. Lockhart responded to that evidence by claiming that he had a more extensive educational background than any of the candidates that were chosen to be interviewed for the position. But Lockhart failed to rebut the USPS's evidence that the interviews were granted, not on the basis of the candidates' educational achievements, but on the basis of their answers to questions on their applications that asked the applicants to describe situations demonstrating their knowledge and abilities in particular skills areas.

In short, neither McKie nor Lockhart introduced sufficient evidence to create a factual question as to whether he was denied a promotion by reason of his race.

V

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

CIVIL ACTION NO.: 4:99-0552-22BF

JAMES WILLIAMS, JR., AND JIMMY E. MCKELVY, JAMES GILCHRIST, BOBBY LACY, ROBERT MCKITHEN, JR., KEVIN MCKIE, ROBERT COOKS, JR., EDWARD N. GRAY, NATHANIEL LOCKHART, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

Plaintiffs,

v.

WILLIAM HENDERSON, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Defendant.

[FILED: September 2, 2003]

In this employment discrimination case, the plaintiffs allege, in part, that the defendant unlawfully discriminated against them in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000*e et seq.* ("Title VII"), on account of their race. In particular, the plaintiffs allege, in part, that they were unlawfully denied promotions and retaliated against for filing complaints of discrimination. The defendant denies these allegations and has filed a motion for summary judgment. (Doc. #90). The plaintiffs oppose this motion and have also field a motion for summary judgment. (Doc. #93).

This matter is now before the undersigned for review of the Report and Recommendation ("the Report") filed by United States Magistrate Judge Thomas E. Rogers, III, to whom this case had previously been assigned. In his Report, Magistrate Judge Rogers recommends that the defendant's motion for summary judgment be granted and that the plaintiffs' motion for summary judgment be denied. As reasoned, in part, by the magistrate judge:

> Plaintiff[s] ha[ve] failed to file [a] motion to certify the class...
>
> Plaintiffs have failed to meet their burden of proving numerosity. Therefore, class certification should be denied and defendant's motion to strike the class action allegations contained in the amended complaint should be granted.....[Gray] cannot establish a prima facie case and has not exhausted his administrative remedies...[therefore,] defendant's motion for summary judgment should be granted and Gray's action dismissed...
>
> Because Lacy failed to bring his action within 90 days of receiving final agency decision his action is time barred...
>
> ...[Gilchrist] has failed to exhaust his claims alleged in this action. Assuming, arguendo, that his claims are timely and have been exhausted, plaintiff presents insufficient evidence to establish an issue of material fat regarding pretext or falsity of defendant's articulated reason...Accordingly, defendant's motion should be granted and Gilchrist's action should be dismissed...

[Cooks] did not file an EEO complaint alleging discrimination. Therefore, has failed to exhaust his administrative remedies. Defendant's motion, therefore, should be granted and Cook's complaint dismissed. Assuming, arguendo, that he did exhaust, he has failed to create an issue of material fact as to defendant's articulated reason or denial of promotion...

McKelvey failed KSA 31 because of his score on the written examination. He fails to present sufficient evidence for a reasonable fact finder to present sufficient evidence to create an issue of fact regarding pretext. His own opinion regarding qualifications in insufficient to overcome summary judgment...

McKithen sought promotion in 1996, but his KSA scores were too low to be promoted. He did not file an EEO complaint alleging discrimination. Assuming, arguendo, that he did exhaust his administrative remedies, he has failed to make a sufficient showing to show pretext or falsity of defendant's articulated reasons.

Mr. Williams filed several EEO complaints [most] of which are time barred...and/or exceed the scope of him complaint in this action...[In an event, Williams] fails to create an issue of fact as to whether or not he was qualified for the position. It is undisputed that Williams failed the KSA 31...Therefore, defendant's motion for summary judgment should be granted...

[Lockhart's] claim is time barred...Additionally, he fails to present sufficient pretext or falsity evidence to survive summary judgment...

> Plaintiffs simply...have failed to indicate any of the particular facts necessary to sustain a claim of retaliation...
>
> ...[U]pon the record before the court, [the plaintiffs] were not qualified because they failed the testing requirements to qualify for promotion eligibility...
>
> ...[P]laintiffs have failed to present sufficient evidence that anyone had improper access to the tests...

The plaintiffs have filed objections to the Report.

On July 24, 2003, a hearing was held before the undersigned concerning the parties' motions for summary judgment, the Report, and the objections filed thereto. At the time, the parties were allowed to present oral argument of their respective legal positions. After careful consideration of the parties' legal arguments, the pleadings, and the relevant case law, the pending motions for summary judgment are now ready for disposition.

In conducting this review, the Court applies the following standard.

> The magistrate judge makes only a recommendation to the Court, to which any party may file written objections...The Court is not bound by the recommendation of the magistrate judge but, instead, retains responsibility for the final determination. The Court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. However, the Court is not required to review, under a de novo or any other standard the factual or legal

> conclusions of the magistrate judge as to those portions of the Report and Recommendations to which no objections are addressed. While the level of scrutiny entailed by the Court's review of the Report thus depends on whether or not objections have been filed, in either case, the Court is free, after review, to accept, reject, or modify any of the magistrate judge's findings or recommendations.

Wallace v. Housing Auth. of the City of Columbia, 791 F. Supp. 137, 138 (D.S.C. 1992) (citations omitted). In light of this standard, that Court has reviewed, *de novo*, the Report and the objections thereto. The Court accepts the Report and concludes that the plaintiffs' objections are not persuasive.[1]

Initially, the undersigned notes that it is undisputed that no motion for class certification was ever filed by the plaintiffs in this case. Thus, to the extent that the plaintiffs' amended complaint seeks relief for a class of persons, that request should be denied as a matter of law. Additionally, even if the plaintiffs had moved for class certification, that motion would have been denied, since the plaintiff cannot establish sufficient numerosity of the class as required by Rule 23 of the Federal Rules of Civil Procedure.

Moreover, it is also undisputed that several of the plaintiffs have failed to timely and/or properly exhaust their administrative prerequisites to bringing the instant actions. Before filing suit under Title VII, a plaintiff must exhaust heir administrative remedies by bringing an appropriate administrative charge of discrimination with the EEOC. King v. Seaboard Cost Line R.R. CO., 538 F.2d 581, 583 (4th

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[1] However, the Court notes that the plaintiffs do have commendable experience and military service.

Cir. 1976). A plaintiff's EEOC charge defines the scope of their subsequent right to institute a civil suit. Evans v. Technologies Applications and Serv. Co., 80 F.3d 954, 962-63 (4th Cir. 1996). If a plaintiff's claims are reasonably related to their EEOC charge and can be expected to follow from a reasonable administrative investigation, a plaintiff may advance such claims in a subsequent civil suit. Chisholm v. United States Postal Serv., 665 F.2d 482, 491 (4th Cir. 1981). Likewise, a plaintiff must file suit within 90 days of receiving a final administrative agency decision. 42 U.S.C §2000e-16(c).

As the undiputed record reflects,plaintiff Edward N. Gray has not filed any administrative charge of discrimination prior to initiation of the instant legal action. Consequently, plaintiff Gray has failed to timely and/or properly exhaust his administrative prerequisistes to suit. For this reason, the defendant's motion for summary judgment should be granted as it relates to plaintiff Gray's claims.

As to the merits of plaintiff Gray's claims, because he undeniably did not apply for a position prior to the initiation of the instant case, his claims would also fail for his reason. It is fundamental that in order to establish a *prima facie* case of unlawful failure to promote, on account of race, a plaintiff must establish that: (i) he is a member of a protected class; (ii) his employer had an open position for which he applied; (iii) he was qualified for the position; and (iv) he was rejected under circumstances giving rise to an inferenee of discrimination. Taylor v. Virginia Union University, 193 F.3d 219 (4th Cir. 1999). This is a burden plaintiff Gray fails to meet.

Specifically, because plaintiff Gray did not apply for a position prior to the initiation of the instant case, he cannot show that the defendant had an open position for which he applied and/or that he rejected for any position prior to the

filling of the instant case. Therefore, summary judgment is also appropriate on plaintiff Gray's claim for this reason.

As well, the undisputed record also reflects that plaintiff Bobby Lacy did not join in the filing of the instant legal action within 90 days after receiving his final agency decision concerning his complaints of unlawful discrimination. To the contrary, plaintiff Lacy received a final agency decision on August 8, 1995, well in excess of 90 days prior to the plaintiff's filing of the instant legal action which was commenced on March 4, 1999.[2] Thus, the defendant's motion for summary judgment should also be granted as it relates to plaintiff Lacy's claims.

Furthermore, because plaintiff Lacy undeniably failed KSA's 3, 36, and 37 for he area maintenance position and KSA's 3, 12, 13, 36, and 37 for the Building Equipment Mechanic position, summary judgment would also be appropriate on the merits of his unlawful failure to promote claims. Assuming plaintiff Gray could establish that he was qualified for the positions sought, which he cannot because of his failing test score, the defendant has come forward with a legitimate non –discriminatory basis for his failure to be promoted (i.e. his failing test scores). Hence, the plaintiff must come forward with sufficient evidence of pretext in order to survive summary judgment. St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). This is a burden plaintiff Lacy has not met.

To the contrary, plaintiff Lacy was not promoted because of his failing test scores. No genuine issue of material fact exists on this issue. For this reason, the

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[2] Plaintiff Lacy also executed a withdrawal of a second administrative charge of discrimination on August 10, 1998. Because of this withdrawal, no final agency decision was ever entered.

defendant's motion for summary judgment should also be granted as it relates to plaintiff Lacy's claims.

Similarly, it is undisputed that plaintiffs Robert Cooks, Jr., Kevin McKie, and Robert McKithen, Jr. have not filed any administrative complaints alleging discrimination. For this reason, the defendant's motion for summary judgment should be granted as it relates to plaintiff Cooks,' plaintiff McKithen's, and McKie's claims.

As well, both plaintiff Cooks and plaintiff McKithen failed multiple KSA tests which resulted in their not being promoted to the General Mechanics position. No genuine issue of material fact exists on this issue. Again, because the defendant has provided a legitimate, non-discriminatory basis for its actions, the plaintiff's must come forward with sufficient evidence of pretext in order to survive summary judgment. Plaintiff's Cook and McKithen fail to meet this burden. Therefore, the defendant's motion for summary judgment should also be granted as it relates to these plaintiff's claims for this reason.

As to plaintiff Nathaniel Lockhart, it is also undisputed that his claims should be dismissed for failure to timely an/or properly exhaust his administrative prerequisites. As the record reflects, plaintiff Lockhart filed an administrative charge of discrimination on March 3, 1993, alleging unlawful failure to promote. However, his complaint was withdrawn on August 3, 1993. Because this complaint was withdrawn, no final agency decision was ever entered. For this reason, the defendant's motion for summary judgment should be granted as it relates to plaintiff Lockhart's claims.

Additionally, plaintiff Lockhart's claims of unlawful failure to promote should also be dismissed on their merits. As the record reflects, plaintiff Lockhart applied for and was denied two entry level supervisory positions. Plaintiff

Lockhart was not recommended for a supervisory position based upon the answers he provided on the postal operations test. In one instance, plaintiff Lockhart answered only 44.3% of the 61 questions asked correctly. The candidate ultimately selected for promotion answered 96.7% of the questions correctly. Again, because the defendant has provided a legitimate, non-discriminatory basis for not promoting plaintiff Lockhart, he must come forward wit sufficient evidence of pretext in order to survive summary judgment. Plaintiff Lockhart also fails to meet this burden. Therefore, the defendant's motion for summary judgment should also be granted as it relates to plaintiff Lockhart's claim for this reason.

As to plaintiff James Gilchrist, it is also undisputed that his claims should be dismissed for failure to timely and/or properly exhaust his administrative charges of discrimination. With respect to the first charge of discrimination, Gilchrist received a final agency decision on November 20, 1997. Because the instant action was commenced more than 90 days after this final agency decision was received by the plaintiff, the defendant's motion for summary judgment should be granted as it relates to plaintiff Gilchrist's claims contained within the first charge. The remaining three charges fail to include those claims in this action. For this reason, the defendant's motion for summary judgment should also be granted as it relates to plaintiff Gilchrist's claims.

Moreover, plaintiff Gilchrist also fails to offer sufficient evidence upon which a reasonable juror could conclude that he was intentionally discriminated against on account of his race. To the contrary, plaintiff Gilchrist was undeniable not promoted due to low, written test scores. As with the other plaintiffs in this action, plaintiff Gilchrist fails to present sufficient evidence of pretext necessary to survive summary judgment. Thus, the defendant's motion for

summary judgment should also be granted as it relates to plaintiff Gilchrist's claims on this basis.

As to plaintiff James Williams Jr., he arguably presented sufficient evidence upon which it could be concluded that he exhausted the necessary administrative prerequisites relative to those claims raised in the final agency decision dated December 8, 1999. Specifically, in that charge of discrimination, Williams alleged that he was unlawfully denied a promotion on account of his race.

However, as the undisputed record reflects, both plaintiff Jimmy E. McKelvy and plaintiff James Williams, Jr. File the KSA 31 test. According to the defendant, these KSA failure were legitimate, non-discriminatory reasons why both McKelvy and Williams were not promoted. Consequently, these plaintiffs must put forth sufficient evidence of pretext in order to withstand the defendant's motion for summary judgment. This is a burden these plaintiffs have not met. To the contrary, the undisputed evidence reveals that both plaintiff McKelvy and plaintiff Williams were not promoted because they failed the KSSA testing. This undeniable conclusion was supported by the affidavit of James Mahoney, Manager of the Postal Services National Testing Center. No basis in the record exists upon which a reasonable juror could conclude that the plaintiffs were subjected to unlawful discrimination. No genuine issue of material fact exists on this issue. Plaintiffs McKelvy and Williams simply failed to pass the requisite tests necessary for promotion. Therefore, the defendant's motion for summary judgment should also be granted as it relates to both plaintiff McKelvy's and plaintiff Williams' claims.

Additionally, plaintiffs allege that the defendant manipulated the matriculation and promotion process in a intentionally discriminatory manner. The plaintiffs assert that such claims form the basis for their claim of disparate impact. Assuming for purposes of argument that these claims

are even properly before this Court,[3] the undersigned concludes that summary judgment would still be appropriate.

As the record reflects, the plaintiff's allege that he particular practice resulting in disparate impact was the "requirements and policies governing the maintenance of the integrity of the test, including access to testing materials..." Although alleged, plaintiffs fail to present to present any evidence that white employees were given access to testing materials and African-American employees were not. Such allegations and conclusory statements, without adequate evidentiary support contained in the record, is insufficient to survive the defendant's motion for summary judgment. The plaintiff s fail to present evidence that whit e employees were given preferential access to testing materials and that Africa-American employees were unlawfully denied such opportunities. There is also insufficient evidence in the record to conclude that there was a denial of a fair opportunity to "update": and retake and pass tests required for promotion. Thus, summary judgment is also appropriate on these claims.

Next, the plaintiffs attempt to assert a claim under the Rehabilitation Act, which prohibits programs that receive federal funding from discriminating on the basis of a disability. Davis v. Univ. of N.C. at Wilmington, 263 F.3d 95, 98-99 (4th Cir. 2001). [4] With respect to the merits of this

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[3] As noted by the Magistrate Judge in his Report, a fair reading of the complaint does not provide fair notice to the defendant of a disparate impact claim.

[4] It is important to note that the Rehabilitation Act requires that the alleged discrimination be based solely on the claimant's disabling condition. The ADA does not have this exclusivity requirement. *See* Baired v. Rose, 192 F.3d 462 , 469 (4th Cir. 1999).

claim, the defendant's motion for summary judgment should also be granted.

To properly state a claim under the Rehabilitation Act, the plaintiffs must establish that: (i) they have a disability as defined under the Rehabilitation Act;[5] (ii) that they are otherwise qualified for the position at issue; and (iii) that they were discriminated against by the USPS solely on the basis of his disability. Davis, 263 F.3d at 99; Baird v Rose, 192 F.3d 462 (4th Cir. 1999); Sellers v. Sch. Bd. of Manassas, 141 F.3d 524, 528 (4th Cir. 1998), *cert. denied,* 525 U.S. 871, 119 S.Ct. 168, 142 L.Ed.2d 137 (1998). This is a burden the plaintiffs have not met.

In the present case, the record reflects that the action s taken by the defendant were both legitimate and non-discriminatory. Likewise, the evidence of record is insufficient upon which a reasonable jury could conclude that the plaintiffs were discriminated against solely on account of their disability. No genuine issue of material fact exists on this issue. Therefore, the defendant's motion for summary judgment should also be granted as it relates to the plaintiffs' claims pursuant to the Rehabilitation Act.

Finally, the plaintiffs' complaint also alleges a cause of action pursuant to the Family and Medical Leave Act ("FMLA"). The purpose of the FMLA is to provide workers with "reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or

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[5] "An individual is disabled under the... Rehabilitation Act if he or she: (1) has a physical or mental impairment that substantially limits one or more of the individual's major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." David, 263 F.3d at 99; *See* 29 U.S.C. 705 (20)(B).

parent who has a serious health condition." 29 U.S.C. §2601 (b)(2). The FMLA also provide that an employer may not discriminate or retaliate against an employee for availing himself of the rights protected by the FMLA. 29 U.S.C. §2615. As didsucussed herein, the defendant's motion for summary judgment should also be granted as it relates to the merits of the plaintiffs' claims brought pursuant to the FMLA.

To make out a *prima facie* case under the FMLA, an employee must show that: (i) he availed himself of a protected right under the FMLA; (ii) that he was adversely affected by an employment decision; an (iii) that there is a causal connection between the employee's protected activity and the employer's adverse employment action. Nichols v. Ashland Hosp. Corp.,251 F.3d 496, 502 (4th Cir. 2001). Again, the plaintiffs have not met their burden in this regard.

As the evidence of record reflects, the plaintiffs failed to provide this Court wit sufficient evidence upon which a reasonable jury could conclude that the alleged adverse employment actions suffered by the plaintiffs were causally connected to any protected activity. NO genuine issue of material fact exists on this issue. Thus, the defendant's motion for summary judgment should also be granted as it relates to the plaintiffs' claims pursuant to the FMLA.

THEREFORE, IT IS HEREBY ORDERED that the Report is **ACCEPTED,** plaintiffs' objections are **OVERRULED**, the defendant's motion for summary judgment is **GRANTED** (Doc. # 90), and the plaintiffs' motion for summary judgment is **DENIED.** (Doc. # 93).

IT IS SO ORDERED.

/s/ TERRY L. WOOTEN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JAMES WILIAMS, JR., AND JIMMY E. MCKELVY, JAMES GILCHRIST, BOBBY LACY, ROBERT MCKITHEN, JR., KEVIN MCKIE, ROBERT COOKS, JR., EDWARD N. GRAY, NATHANIEL LOCKHART, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

-vs-

WILLIAM HENDERSON, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE,

Defendant.

Report and Reccomendation
[Filed: February 28, 2003]

This matter is before the court on cross motions for summary judgment. Defendant's motion was filed April 24, 2002 (document # 90) and plaintiff's motion was filed April 26, 2002 (document # 93).

I. PROCEDUARL HISTORY

The plaintiffs, nine current, African-American employees of the United States Postal Service, filed the

instant complaint on March 4, 1999, alleging that the defendant, William Henderson, Postmaster General of the United States Postal Service, ("Henderson") violated Title VII of the Civil Rights Act of 1964, in numerous respects. In particular, the plaintiffs allege that they were denied promotions due to their race and retaliated against for the filing of EEO complaints. The plaintiff's purport to represent not only themselves, but also all other similarly situated employees. As a result, the plaintiffs seek damages in a n unspecified amount. On May 10, 1999, the defendant timely and properly filed his answer. On June 11, 1999, without first moving to amend the complaint, the plaintiff filed an amended complaint. By consent order filed July 30, 1999, the plaintiffs were permitted to file another amended complaint. On August 5, 1999, the plaintiff filed another amended complaint.

The Amended Complaint

Plaintiffs' complaint, in summary, alleges the following: plaintiffs allege that class members have suffered race discrimination arising from the same set of facts in each case, and that class members' damages are identical. (Amended Complaint at ¶ 5). Plaintiffs maintain that while the class lacks vast numerosity, the issues raised in their complaint affect not only current black employees of the USPS, but also past and future employees. *Id.*

Maintenance plaintiffs allege that defendant utilizes a three-part process to determine promotions from Maintenance Mechanic, with each part totaling one-third promotions from Maintenance Custodian to Maintenance Mechanic, with each part totaling one-third of an eligibility score. The first step in the promotion process involves completing a combined application form and experience statement, known within the postal system as a "KSA" short for "Knowledge, skills and aptitude." *Id.*. at ¶ 6. A

maintenance manager's written evaluation of the employee comprises the second third of the score. Amended complaint at ¶ 7. The final stage requires the candidate to appear before a three-member board for an oral examination on general knowledge. *Id.* at ¶ 8. The three scores are then aggregated to determine the candidate's eligibility for promotion. *Id.* at ¶ 9. No single portion of the promotion process is determinative of eligibility, as sufficiently high scores on any two parts may offset a failing score on the third part to render a candidate eligible for promotion. *Id.* However, if tow sections are weak, a strong showing in the third section will not be sufficient to attain an "eligible score". *Id.*

Plaintiffs in the maintenance sub-class allege that defendant consistently and intentionally applies the above-outlined promotion process in a racially-biased manner that favors white employees over black employees. *Id.* at ¶ 15. According to plaintiff's complaint, this is evidenced by the fact that although USPS has employed plaintiffs for over five years, their supervisors have never evaluated them pursuant to the second step of the promotion process. (Amended complaint at ¶ 17). In contrast, plaintiffs contend that all white custodians received evaluations within one year of commencing employment with the USPS. *Id.* at ¶ 19. Plaintiffs further allege that Human Resources personnel, responsible for insuring compliance with race-neutral hiring and promotion practices, have refused to conduct appropriate investigations regarding complaints to racial bias in the promotion process. *Id.*at ¶ 20. Plaintiffs further point out that these same human Resources Administrators sit on the promotion review board with maintenance supervisors. *Id.* One administrator purportedly issued a directive forbidding plaintiffs from voicing complaints or racial bias in the promotion process. *Id.*

Maintenance plaintiffs further assert that since filing their complaint with the Equal Employment Opportunity

Commission (EEOC), they and/or their class members have been subjected to retaliatory personnel actions. (Amended complaint at ¶ 22.) Specifically, plaintiffs maintain that the USPS directed its supervisors to deny, in a manner biased against black workers, the legitimacy of medically-documented work absences as a means to discharge plaintiffs. *Id.* In addition, plaintiffs allege that the USPS directed one plaintiff, under threat of discharge for noncompliance, to provide perjured testimony to an Administrative Law Judge ("ALJ"). *Id.* at ¶ 25. In addition, plaintiffs state that USPS managers tolerated and/or used racial slurs toward plaintiffs. *Id.* at ¶ 26. Plaintiffs further charge that one supervisor, David Brandon, to avenge their filling of racial discrimination complaints, has threatened their lives, attempted to run down one employee witness with his car, and repeatedly stalked plaintiffs forcing plaintiffs to seek court intervention when with his car, and repeatedly stalked plaintiffs forcing plaintiffs to seek court intervention when defendant failed to take action against Brandon. *Id.* at ¶ 27. Plaintiffs claim they have also had job-route descriptions changed to include new duties involving heavy lifting and walking, which defendant allegedly knows plaintiffs cannot complete because of their physical handicaps and disabled veteran status. (Amended complaint at ¶ 28).

Regarding the distribution class, plaintiffs state that defendant rates applicants for promotion in the distribution system based on experience, education, and internal training evaluations. *Id.* at ¶ 32. Plaintiff Lockhart has worked for the USPS for more than twenty years. *Id.* at ¶ 35. During that time, he allegedly has completed almost every training program offered for mail distribution employees. *Id.* Lockhart also holds a Bachelor's Degree in Business Administration, and a Master's degree in Human Resources and Management. *Id.* Plaintiffs maintain that Lockhart has sought numerous promotions, but in spite of his glowing

recommendations and plethora of experience and training, he has been repeatedly denied. (Complaint at ¶ 36, 39). Plaintiffs contend that in every case, the candidate selected for the position was white and less qualified than Lockhart. *Id.* In addition, plaintiffs aver that since Lockhart filed his racial discrimination complaint, he has been repeatedly and intentionally passed over for promotion. *Id.* at ¶ 39.

Plaintiffs further allege that Lockhart's experience is not unique. Plaintiffs note that it has been ten years since a black employee has been promoted to a supervisor and that he had to file an EEO complaint in order to attain the promotion. *Id.* at ¶ 37. Plaintiffs also attest that blacks in distribution sections of the postal service in South Carolina are severely under-represented in management positions when compared to the population percentage of blacks in the state. *Id.* at ¶ 39. Plaintiffs maintain that these facts indicate a clear racial bias in the subjective management selection process within South Carolina's postal service. *Id.*

Plaintiffs Williams, McKelvy, and Gilchrist claim that because of the above-stated actions, they decided to undertake the appropriate administrative procedures, which under statue are a necessary pre-requisite to filing a racial discrimination action in the federal courts. They state that they sought advice from the Postal Service's Office of EEO compliance. (Williams Aff. at ¶ 2; McKelvy Aff. at ¶ 2; Gilchrist Aff. at ¶ 6). Both Williams and McKelvy assert that the office did not provide them with any counseling on EEO procedures, but rather just handed them several forms to fill out. (Williams Aff. at ¶ 2). Williams and McKelvy further state that they specifically mentioned that the same type of discrimination that had been practiced against them had also been practiced against other employees, and that the scope of the complaint accordingly extended to their black coworkers. (Williams Aff. at 3; McKelvy Aff. at ¶ 3). Gilchrist also claims that he inquired about filing a class action suit.

(Gilchriset Aff. at ¶ 6). However, the EEO Alternative Dispute Resolutions Specialist, Earthia Jenkins, allegedly told them that, even though the cases against them and the other employees were identical, "each case had to be filed individually." (Williams Aff. at ¶ 3; McKelvy Aff. at ¶ 3; Gilchrist Aff. at ¶ 6). Williams and McKelvy further maintain that they were never given any information regarding the distinction between a class action suit and an individual action suit, and its significance. *William Aff. at ¶ 5; McKelvy Aff. at ¶ 5; McKelvy Aff. at ¶ 5). Williams, McKelvy, and Gilchrist have also sworn that there was never any poster on the employee bulletin board stating anything about filing class action suits. (Williams Aff. at ¶ 6; Gilchrist Aff. at ¶ 5). All three add that the new poster merely states who to contact regarding civil right violations, as well s the time limits for filing complaints. (Williams Aff. at ¶ 6; McKelvy Aff. at ¶ 6; Gilchrist Aff. at ¶ 5.)

Williams and McKelvy accordingly filed separate individual EEO complaints alleging racially-biased promotion practices. After the EEOC conducted appropriate investigations, a hearing was held before and ALJ for Williams and McKelvy on August 18 and August 19, 1998, respectively. The EEOC issued its final order for Williams and McKelvy on December 8 and December 2, 1998, respectively, accompanied by an authorization to sue. Gilchrist also filed two administrative complaints, alleging retaliatory practices by an authorization to sue. Gilchrist also fled two administrative complaints, alleging retaliatory practices by the same offending parties named in Williams' and McKelvy's complaints. On May 19, 1999, the EEOC dismissed both complaints, holding that the EEO complaints raised the same issues as those raised in the district court complaint.

Based upon the defendant's raciaily-biased promotion system, as well as retaliatory measures brought

against plaintiffs, plaintiffs allege that they have suffered mental distress, loss of prestige, lost wages, and lost benefits and seniority. As a result, plaintiffs seek damages and attorney's fees and costs; a permanent injunction ordering defendant to administer the USPS's promotion system in a race-neutral fashion; an Order directing defendant to fire numerous employees; and Order compelling defendant to begin recruiting black management personnel until the USPS management reflects the racial composition of the state; and an Order mandating that defendant create a promotion scheme that redresses the financial and seniority injuries suffered by the class members resulting from their denials of promotions. The plaintiffs further request an order directing Henderson to compensate the class members for the pecuniary and non-pecuniary damages suffered by them as established by a jury. The plaintiffs request an Order directing Henderson pay the attorneys fees and the costs incurred in the pursuit of this action. (Amended Complaint, p. 19).

Defendant's Motions

On September 30, 1999, the defendant filed a Motion to Dismiss or in the Alternative, for Summary Judgment and Memorandum in Support of Motion. Within that motion, the defendant alleged that the plaintiffs could not proceed with a class complaint because they have failed to exhaust their administrative remedies prior to proceeding to court. On February 16, 2000, the Honorable Judge Patrick Michael Duffy ordered that the defendant's motion to dismiss, or in the alternative for summary judgment be denied. In this Order, Judge Duffy found that the record before it presented "issues of fact which, if true, would provide excuse based on equitable considerations for Plaintiff's failure to file a class administrative action –namely, that the consulted EEO counselor misleadingly gave them the impression that a class action remedy was not available to them, and that they could

file only an individual action. Thus, the Court will not dismiss Plaintiff's instant class action suit due to a failure to exhaust class administrative remedies, and will allow Plaintiffs' class action to proceed. "(Order, document #33). Judge Duffy stated that "The Court notes that this Order does not in any way relate to the certification of the class issue, which has not been argued as of the date of his Order." (Document #33, p. 15 and 18).

On April 23, 2002, defendant filed a motion for summary judgment (document #90) and filed a memorandum in support of that motion on April 25, 2002, (document #91). The plaintiffs filed a motion for summary judgment on April 26, 2002 (document # 93). Plaintiffs did not file a memorandum in support of that motion. On May 15, 2002, plaintiffs filed a memorandum in opposition of defendants' motion for summary judgment (document # 95). On May 20, 2002, defendant filed a memorandum in opposition to the plaintiffs' motion for summary judgment (document #96). D3efendant also filed a reply brief to plaintiffs' opposition to defendant's motion for summary judgment on May 22, 2002. (Document #97). A hearing was convened on January 6, 2003. Subsequent to the hearing, defendant filed additional briefs on January 21, 2003 (Doc. #130) and February 10,l 2003. Plaintiffs filed a supplemental brief on January 30, 2003 (Doc. #131).

II. SUMMARY OF THE FACTSBACKGROUND

As stated above, the plaintiffs, nine current, Africa-American employees of the United States Postal Service ("USPS"), filed the instant action alleging that defendant Henderson violated Title VII of the Civil Rights Act of 1964. Plaintiff's state in their opposition to defendant's motion for summary judgment that plaintiff James Gilchrist is now disabled-retired from the USPS. Within their complaint, the plaintiff's designate themselves as being in either the

"maintenance" or "distribution" sub-class. (Amended Complaint at ¶ 4.) Plaintiff Nathaniel Lockhart ("Lockhart") alleges that he is in the "distribution" sub-class. Lockhart alleges that he was denied a promotion to a management position on the basis of his race. Each of the remaining plaintiffs, James Williams, Jr. ("Williams"), Jimmy E. McKelvy ("McKelvy"), James Gilchrist ("Gilchrist"), Bobby Lacy ("Lacy"), Robert McKithen, Jr. ("McKithen"), Kevin Mckie ("Mckie"), Robert Cooks, Jr. ("Cooks"), and Edward N. Gray ("Gray"), allege that they are members of the "maintenance" sub-class and were discriminated against on the basis of race when their supervisors did not evaluate them on their Knowledge, Skills and Aptitude ("KSA's") in certain areas. Specifically, these eight plaintiffs claim that they were discriminated against because they received no score or lower scores than white employees on the Maintenance System Selection ("MSS") Supervisor evaluations. The plaintiffs also allege that the failure to evaluate them led them to be denied promotions within their class. (Complaint ¶'s 6-21).

A. Process for promotion

As stated, the defendant filed a motion for summary judgment on April 23, 2002. In the memorandum submitted to support that motion, the defendant sets out the Maintenance System Selection process and its promotional system which has not been materially challenged by appropriate evidence. Therefore, the undersigned will set out this process herein as the defendant set forth in his memorandum (quoted verbatim with the exception of the references to affidavits, depositions, etc.).

> The maintenance craft is comprised of several positions, including Custodians Level 3, Maintenance Mechanic Level 5, Maintenance Mechanic MPE Level 7, Building Equipment

Mechanic, and Electronics Technician. The Maintenance Mechanic Level 5, Maintenance Mechanic MPE Level 7, Building Equipment Mechanic, and Electronics Technician jobs are known as higher level positions and eligibility for those jobs are governed by the MSS.

The Postal Service employs the MSS to select the best qualified candidates for higher level maintenance positions. Under the MSS, there are three types of applicants for maintenance positions-entrance inservice, and incraft-an the process is different depending on the type of applicant.

An incraft applicant is a postal employee who is in the maintenance craft and is taking the test so that he/she can e eligible for a higher level position within the maintenance craft. A successful in-craft applicant is placed on the Promotion Eligibility Register ("Promotion Register") an is promoted into the higher level position based on his/her position on the register.

Incraft applicants who wish to be promoted into a higher level position must request the opportunity to be placed on the Promotion Register. Once they express an interest in promotional opportunities, they then undergo three component process involving a written examination, a review panel evaluation, and supervisor evaluation.

Each component is designed to measure the employee's knowledge, skill, and abilities (KSAs) relevant to the position.

The examination and review panel and supervisor evaluations are sent to the National Test

Administration Center (NTAC) for scoring. Scoring is calculated from a mathematical formula based on logarithms. Accordingly, each test component-that is, the written examination, the review panel evaluation and the supervisor evaluation-is not scored individually. Instead, the components are scored based on a logarithmic analysis. These logarithms calculate a composite score for each KSA. This same methodology is used by NTAC for MSS process in postal facilities all over the country. To protect the integrity of the test, the Postal Service, in agreement with the Union, has maintained as confidential information this methodology and no supervisor has been made aware of the exact scoring process.

Supervisor evaluation measure an employee's knowledge skills and abilities on such job related matters such as safety, mail processing and equipment operations, lubrication materials, cleaning materials, and procedures, HVAC, applied theory, pattern detection, written and oral communications, following instructions, working habits, hand tools, portable power tools and shop power equipment. A supervisor can give an employee a rating of 1 to 5, with 5 representing superior knowledge. Alternatively, a supervisor may give an employee a Cannot Evaluate or "CE" rating for a particular KSA. Under NTAX scoring rules, a CE does not adversely affect an employee's composite score. A CE rating simply means that the supervisor evaluation is not used to determine whether an employee would pass or fail that particular KSA. Whenever an employee receives a CE rating, the testing logarithms are adjusted to compensate for the lack of an evaluation by the supervisor. Specifically, the logarithms are recalculated so that the absence of a supervisor evaluation does not penalize the candidate.

In other words, the scoring is adjusted to that MSS results are based solely on the MSS candidate's knowledge exhibited on the written examination. Consequently, a CE rating can never cause an employee to fail a particular KSA. His/her success rests on the objective test scoring of the person's knowledge.

Once the system calculates the composite score, NTAC sends the score results to the postal facility and the applicant. The results form indicates whether the applicant was deemed "Ineligible" or "Eligible" for each position to which he or she applied. If the applicant was rated eligible for apposition, the form indicates the applicant's rating score and the applicant is placed on the promotion Register.

Incraft applicant s who are deemed ineligible are notified of the particular KSAs that they have failed. The MSS establishes procedures for those incraft applicants, who have received an ineligible rating, to update their scores for a particular position. First, any request to update a score for a particular position must be submitted in writing with document of the new or additional education, training or experience that he/she has received. The request must be submitted within 30 days of completion of the additional education, training or experience.

An employee will be eligible to update his/her scores orly if the additional training, education or experience is relevant to the KSAs of the position for which they wish to update their scores and the additional training, education or experience covers all of the position's KSAs that the employee has previously failed.

(Memorandum, document # 91, p. 4-7).

Facts Specific to Each Named Plaintiff

James Williams, Jr.

Mr. Williams registered for the General Mechanic M38 position. He received an ineligible rating because he failed certain KSAs. Mr. Williams failed KSA 21 (applied theory) and KSA 31 (hand tools) to the M38. Mahoney Dec. ¶ 16. For both KSAs, he reviewed a supervisory evaluation of CE. Id. Even if he would have received the highest score of 5 on his Supervisor Evaluation, he still would have received a failing score on the KSA. Id. Even if he would have received the highest score of 5 on his Supervisor Evaluation, he still would have received a failing score on the KSA. Id.

Mr. Williams took additional training in 1996 to update his scores. Id. at ¶ 16. He applied for an update and retook the M 38 examination. Id. He received a Supervisor Evaluation score of CE for KSAs 21 and 31. He passed the KSA 21 but again failed KSA 31 based on the written examination. Id.

Mr. Williams filed an EEO complaint of discrimination. In the process, he met with a Ms. Ertha Jenkins, and EEO official, for the purpose of preparing his complaint. Williams Depo. at 32. He discussed the merits of his case with her. Id. at 38. They did not discuss a class action. Id. In fact, Mr. Williams did not know anything about a class action at the time. Id. Mr. Williams was represented in his EEO action by Daniel Ellerbe, a representative of the

National Alliance. Mr. Williams did not file an administrative class complaint.[1]

Mr. Williams filed an EEO complaint on July 5, 1996, alleging discrimination based on race when on April 29, 1996, he received a low supervisor's evaluation which caused him to be rated ineligible for the Maintenance Mechanic Test. The final agency decision of December 8, 1998, found no discrimination. Exh. 1 to Sandra W. Harrison Declaration attached to Defendant's Memorandum filed September 30, 1999 (Harrison Decl.).

Mr. Wililams filed an EEO complaint on December 30, 1996, alleging discrimination based on retaliation when on October 4, 1996, he was issued a seven day suspension for Unauthorized Expansion of Break and Unauthorized Leaving of Work Area. The final agency decision of January 16, 1998, found no discrimination. Id.

Mr. Williams filed an EEO complaint on October 14, 1997, alleging discrimination based on retaliation when on September 10, 1997, his request for sick leave for a doctor's appointment was initially denied then approved. The final agency decision of November 14, 1997, dismissed the complaint because it found Mr. Williams was not "aggrieved' within the definition of the law. Mr. Williams did not file an appeal with the EEO. Id.

Mr. Williams filed an EEO complaint on September 2, 1997, alleging discrimination based on retaliation when on June 28, 1997, and July 5, 1997, management changed his schedule on Saturday only, splitting his consecutive days off.

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[1]This testimony is taken from his deposition transcript. The previous fact found on page 5 are from his affidavit submitted in response to defendant's initial motion for summary judgment.

The complaint was voluntarily withdrawn on April 23, 1998. Id.

Mr. Williams filed an EEO complaint on February 12, 1998, alleging discrimination based on race when on January 14, 1998, he was denied the opportunity to train with someone who had knowledge of hand tools when white employees were allowed special training; and on January 16, 1998, his work was inspected while white employees work was not inspected. The final agency decision of November 30, 1998, found no discrimination. Id.

Mr. Williams filed an EEO complaint on April 30, 1998, alleging discrimination when on February 19, 1998, he was not allowed to report to work due to a back strain and was charged 56 hours of leave without pay. The final agency decision of March 15, 1999, found no discrimination. Id.

Jimmy E. McKelvy

Mr. McKelvy failed KSA 31 (hand tools) to the 38. Mahoney Dec. at 17. He received a Supervisor Evaluation score of 2.5. Id. However, regardless of the Supervisor Evaluation score, he scored so low on the written examination that he would have failed the KSA 31 even if he would have received the highest score possible on the Supervisor Evaluation. Id. McKelvy retook the written examination and again failed the KSA 31, causing him to be ineligible for promotion.

Mr. McKelvy filed administrative complaints involving the MSS selection process. He discussed his case with Ms. Ertha Jenkins. He told her that Mr. Brandon gave two white employees higher scores on the hand tools evaluation, bu gave him a "cannot graduate." McKelvy Depo. at 26. He mentioned Mr. Williams but Ms. Jenkins told him Mr. Williams did not have anything to do with his

claim. Id. at 27-28. After meeting with Ms. Jenkins, Daniel Ellerbe also represented Mr. McKelvy in his EEO action. Id at 30-32.

Mr. McKelvy filed a complaint on July 5, 1996, alleging race discrimination when on May 20, 1996, he received an evaluation and learned that his supervisor did not rate him under the job element of hand tools, which prevented him from being considered for promotion. The final agency decision of February 12, 1999, found no discrimination. Mr. McKelvy did not file an appeal with the EEO. Exh. 1 to Harrison Decl.

Robert McKithen, Jr.

Mr. McKithen registered for the General Mechanics M38 position in 1996. Mahoney Decl. at ¶ 18. He failed KSA 1 (basic mechanics), 5 (safety) and 31 (hand tools). Id. On KSA 31 and 5, he received Supervisor Evaluation scores of 3 and 4, respectively. For KSA 1, he received a review panel evaluation score of 1.5, and an even lower written test score. He written test scores caused him to fail the M38. Id.

Mr. McKithen did not filed a EEO complaint alleging discrimination.

Robert Cooks, Jr.

Mr. Cooks failed KSAs 21 (applied theory) and 36 (test equipment) to the M38. Id. at ¶ 20. He received a Supervisor Evaluation score of CE for KSA 21 and a review panel evaluation of 1 for KSA 36. Id. He failed to pass the written test component of the MSS. Even if he would have received the highest Supervisor Evaluation score For KSA 21, he would have a failing KSA score. Id.

Mr. Cooks did not file a EEO complaint alleging discrimination.

James Gilchrist

Mr. Gilchrist failed KSA 31 (hand tools to the M38 examination. Mahoney Decl. at ¶ 19. He received Supervisor Evaluation score of 3 for KSA 31. However, he failed KSA 31 because of an extremely low written score. Id.

Mr. Gilchrist did not file an EEO complaint alleging discrimination in this regard.

Mr. Gilchrist filed an EEO complaint on July 24, 1997, alleging discrimination based on race, retaliation, age and disability when on March 18, 1997, and April 1, 1997, he was assigned custodian laborer duties which where outside of his job as a Group Leader Custodian. The final agency decision was issued on November 20, 1997, dismissing the complaint as untimely. Exh. 1 to Harrison Decl.

Mr. Gilchrist also filed an EEO complaint on October 24, 1997, alleging discrimination based on race and retaliation when on August 27, 1997, he was relived of his duties as a Group Leader Custodian. This complaint was remanded to the agency by the Administrative Law Judge on April 28, 1999, due to the instant litigation. Id.

Mr. Gilchrist filed an EEO complaint on November 29, 1997, alleging discrimination based on race, age and disability when on September 9, 1997, he was issued a letter instructing him to provide medical documentation for every unscheduled absence, when on September 17, 1997, he was harassed and humiliated, and when on September 24, 1997, he received a letter mandating that he see a Employee assistance Program Counselor. The final agency decision

was issued on April 22, 1999, remanding the case to the agency due to the instant litigation. Id.

Bobby Lacy

Mr. Lacy applied for the General Mechanic, the Building Equipment Mechanic (BEM) and the Area Maintenance Specialist positions. Lacy Depo. at 72-73. He reviewed an ineligibility rating for 56 for the General mechanic Position and was placed on the register. Id. at Exh. 4. He received an ineligible rating for the BEM and Area Maintenance position. Id. Mr. Lacy completed a Maintenance Selection System Candidate Supplemental Application (CSA Booklet) for the Area Maintenance and BEM positions. Id. at 74, 88-89; Exhibit 5 & 6 to Defendant's motion. In each CSA Booklet, he described his educational and vocational work experiences for the applicable KSAs. Id. In the booklet, he indicated that he had no vocational or work experience with KSA 3 (Basic Electronics), KSA 36 (Use of Test Equipment), and KSA 37 (Soldering). Id. at 78-80; Exhibit 5 to Defendant's memorandum of September 30, 1999 (Def. Memo). The Review Panel gave Mr. Lacy a rating of 1 for KSAs 3, 36, and 37.

Mr. Lacy also indicated in the booklet that he had no vocational or work experience with KSA 3 (Basic Electronics), KSA 12 (Refrigeration), KSA 13 (Heating, Ventilating and Air Conditioning), KSA 36 (Use of Test Equipment), and KSA 37 (Soldering) for the BEM position. Id. at 94-99; Exhibit 6 to Def. Memo. Due to his lack of education and vocational experience, the Review Panel gave Mr. Lacy a rating of 1 for KSAs 3 and 37, a 1.5 for KSAs 12 and 13, and a 2 for KSA 36. Stih Declaration, Exhibit 5 to Def. Memo.

Lacy failed KSAs 3, 36, and 37 for the Area Maintenance Position and KSAs 3, 12, 13, 36 and 37 for the BEM position. Lacy Deposition; Exhibit 4 to Def. Mem.

Mr. Lacy filed an EEO complaint on July 5, 1994, alleging discrimination based on race when he was not timely given his general mechanic test score, causing him to miss a promotional opportunity. The final agency decision was issued on August 8, 1995, finding no discrimination. Mr. Lacy did not file and appeal with the EEO. Id.

Mr. Lacy filed an EEO complaint on December 30, 1996, alleging discrimination based on race because he was denied a second chance to qualify for a maintenance mechanic position. Mr. Lacy withdrew his compliant on August 10, 1998. Id. Before an EEOC administrative judge, he executed a form withdrawing his complaint, which also states "I understand that I have no further right of appeal." Lacy Depo. at 132-134; Exhibit F to Def. Memo.

Kevin McKie

In 1994, Mr. McKie requested to be placed on the Promotion Register for the Electronic Technician (ET) position. McKie Depo. at 15-16. He participated in the MSS process for the M27 examination. Gerald Frederick, a white employee, also applied for the ET position at the time. Stih Declaration at 5; McKie Depo. at 17, 20. Both Employees participated in the MSS process. Both received ineligible ratings. Stih Declaration. at 6. Mr. McKie was placed in the ET9 position in September 1995. Id.

Mr. McKie and Mr. Fredrick obtained additional training and requested to take an update examination on M 27.[2] Mr. McKie received a rating of 75 and Mr. Frederick

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[2] Mr. Frederick obtained the additional training first. However, the position was kept open until Mr. McKie had

received a rating of 80. Stih Declaration at ¶ 6. Both were placed on the Promotion Register. Id. Mr. Frederick was placed in the ET9 position in August 1994 and Mr. McKie was placed in the ET9 position in September 1995. Id.

Mr. Frederick's higher rating was a result of his more extensive experience in areas pertinent to the electronics technician position, including his five years working as a an maintenance electrician. Mahoney Declaration at ¶24.[3]

Mr. McKie did not file an EEO complaint alleging discrimination.

Nathaniel Lockhart

Mr. Lockhart was a city letter carrier at the Florence Post Office. He applied for two entry level supervisory positions, one at the Greenwood post Office and the other at the Taylor Post Office. Lockhart Depostion at 5. He applied for both postions by submitting a Form 991 job application form. Pursuant to procedure, each application submitted was submitted to a review committee Glinski Declaration at ¶2; Daniels Declaration at ¶3. The Selecting Official reviews those recommended candidate's applications, interviews the candidates and then selects a candidate for the position. Id.

For the Greenwood position, the Review Committee recommended Mr. Lockhart, Ms. Mary Clemmons, and Mr. Edward Dixon for the position. Glinski Declaration at ¶3. All three candidates were interviewed by Postmaster Steve Glinski (Glinski). Id. During the interview, Glinski asked

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the opportunity to receive additional training and update his M 27.

[3] See pp. 9-14 of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment for discussion of qualifications of McKie and Mr. Frederick.

each candidate a series of 61 questions designed to understand each candidate's knowledge of the basics involving supervision of mail processing, retail operations and delivery/collection of mail. Id. Each interview was recorded. Id.

Mr. Lockhart answered 44.3% of the questions correctly. Glinski Declaration at ¶5. Mr. Dixon, the selectee, answered 96.7% of the questions correctly. Id. at ¶7. Based on their performance in the job interview, particularly Mr. Dixon's superior knowledge of postal operations in general and the Greenwood Post Office's specific operation, Glinski selected Mr. Dixon of Mr. Lockhart. Id. at ¶8.

For Taylor position, the Review Panel consisted of a white female, and white male and a black male. Daniels Declaration at ¶1. Each member of the panel individually rated each candidate. Id. at ¶4. The panel then discussed each candidate and formed a consensus on their scores. The panel recommended Carolyn Burdette, Brenda Buyesse, Joanne Mason, Owen Reeves, and Kay Ward for the position. Mr. Lockhart was not recommended by the panel. Id.

The Review Panel based their ratings and recommendations on the answers to the applicants' answers provided on the Form 991.Id. at ¶5. The forms do not indicate the race of the candidate Id. The panel based its decisions on the quality of the written submission of each candidate. Id.

Mr. Lockhart filed a complaint on March 3, 1993, alleging discrimination based on race and retaliation when on December 1, 1992, he was not given equal training. Exh. R. to Def. Memo. He executed a form withdrawing his EEO complaint which included a waiver of appeal through the EEO process. Exh. S to Def Memo.

Edward N. Gray

Mr. Gray did not apply for a position prior to the filing of the complaint in this case. Gray Dep. At pp. 28-29.

Mr. Gray has not filed an EEO complaint alleging discrimination.

II. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs filed a motion on April 26, 2002, seeking summary judgment on their claim for retaliation. Plaintiff did not attach a copy of a memorandum in support of that motion in violation of Local Rule 7.04. Defendant filed a memorandum in opposition to plaintiffs' motion for summary judgment on May 20, 2002. Plainiffs motion for summary judgment consisted of one page with no attached memorandum or brief. Plaintiffs submitted a voluminous mound of discovery materials produced int his case. In fact, the documents submitted with the one page motion take up two entire court folders and could not be scanned due to exceeding the 200 page limit. The documents appear to approach if do not exceed 1,000 pages. The undersigned recommends that plaintiffs' motion for summary judgment be denied based on the above violation of the Local Rules.

To prove a claim for retaliation under Title VII, a plaintiff must show (1) he engaged in protected activity, (2) the employer took adverse employment action against him, and (3) a causal connection existed between the protected activity and the adverse action. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).

Gilchrist is the only plaintiff who submitted an affidavit[4] in support of the motion for summary judgment. He claims that a letter of warning was issued to him when he appeared at a FFO hearing. In order to sustain his claim, he must show a temporal relation between the alleged protected activity and show an adverse employment action. Gilchrist has failed to present sufficient evidence to satisfy either of these requirements.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant filed a motion for summary judgment on May 20, 2002. Defendant argues that he should be granted summary judgment for the following reason:

1. Only plaintiffs Williams, McKelvy, and Gilchrist have timely exhausted their administrative remedies regarding their promotion claims. Accordingly, this court must dismiss and/or remand to the EEOC the promotion claims of plaintiffs Lacy, Gilchrist, Cooks, Gray, McKithen, McKie, and Lockhart for failure to exhaust administrative remedies. (Memorandum) p. 2).

2. No plaintiff has ever filed an EEOC administrative complaint regarding the discriminatory application of either the FMLA or the Rehabilitation Act. Consequently, those claims must be dismissed for failure to exhaust administrative remedies as well. (Memorandum p. 2).

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[4] Plaintiffs submitted affidavits in opposition to defendant's motion for summary judgment. Considering the facts contained therein, plaintiffs' motion for summary judgment should be denied.

3. Even assuming that the plaintiffs could overcome these significant procedural barriers, plaintiffs' claims must be dismissed because they lack substantive merit.

4. First, plaintiff Gray's claim fails because he never suffered an adverse employment action prior to filing of the complaint. (Memorandum p. 3).

5. Second, Gilchrist's, Cooks's, McKelvy's, McKithen's and Williams's claims fail because they were not otherwise qualified for h job and/or that their failing MSS scores were not due to the alleged discriminatory supervisor actions. Claims by plaintiffs McKie and Lockhart fail because they cannot establish that the Postal Service acted with discriminatory animus. (memorandum p. 3)

6. Plaintiffs have failed to assert an administrative class complaint. (Memorandum p. 21).

7. The lack of class certification precludes Gilchrist, Cooks, McKie and McKithen from pursuing their claims. (Memorandum p. 24).

8. Plaintiffs McKie and Lockhart cannot prove pretext. (Memorandum p. 30).

9. There are no viable claims of retaliation. (Memorandum p. 32.).

Plaintiffs filed their memorandums in opposition to defendant's motion for summary judgment. In their memorandums, plaintiffs argue as follows:

1. Plaintiffs have presented sufficient evidence to deny defendant's motion for summary judgment on disparate impact, disparate treatment and retaliation.

2. Failure to promote for racially discriminatory purpose claims are actionable under 42 U.S.C. Section 1981.

3. Plaintiffs have an administrative class complaint and as such continue to have a group action.

4. Any issues relative to the exhaustion of administrative remedies would and does not deter agents of the defendants of the continuous discriminatory acts-engagement in a pattern and practice of wrong.

5. Plaintiffs have sufficiently pleaded a disparate impact claim.

IV. STANDARD FOR SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56 ©, Fed. R. Civ. P. The moving party has the burden of proving that judgment on the pleading is appropriate. Once the moving party makes the showing, however, the opposing party must respond to the motion with "specific facts showing there is a genuine issue for trial. "Rule 56(e), Fed. R. Civ. P.

When no genuine issue of any material fact exists, summary judgment is appropriate. Shealy v. Winston, 929 F.2s 1009, 1011 (4th Cir. 1991)/ The facts and inferences to

be drawn from the evidence must be viewed in the light most favorable to the non-moving party. Id. While the court is to afford liberal consideration to a complaint filed by a pro se plaintiff, it is not required to ignore a clear failure of proof with respect to any question of fact. To the contrary, "'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'" Id. (quoting Anderson v. Liberty Lobby. Inc., 477 U.S. 242 (1986)). "Genuiness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir 1985).

In this case, defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If defendant carries this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." Id. at 718-19 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Moreover, "once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." Baber v. Hosp. Corp. of Am., 977 F.2d 872, 874-75 (4th Cir. 1992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Id. and Doyle v. Sentry Inc., 877 F. Supp. 1002, 1005 (E.D.Va. 1995). Rather, the non-moving party is required to submit evidence of specific facts by way of affidavits [see Fed. R. Civ. P. 56(e)], depositions, interrogatories, or admissions to demonstrate the existence of

a genuine and material factual issue for trial. Baber, citing Celotex Corp., supra. Moreover, the non-movant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corporation, 12 F.3d 1310, 1316 (4th Cir. 19930 and DeLeon v. St. Joseph Hospital, Inc., 871 F.2d 1229, 1233 (4th Cir. 1989), n.7. Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547 (5th Cir. 1987), and Evans v. Technologies Applications & Services Co., 875 F. Supp. 1115 (D.Md. 1995).

V. Discussion

Class Complaint

The exhaustion procedures apply to class complaints. Murphy v. West, 1999 WL 64284 (4th Cir. 1999) (unpublished). In other words at least one member of the administrative class must exhaust a class administrative complaint. The compliant must provide "specific information or details of discriminatory action suffered by [the class]." Id. (citing Woodward v. Lehman, 717 F.2d 909, 914 (4th cir. 1983)). Prior complaints filed by individual class members and the exhaustion of individual administrative remedies are not sufficient to satisfy the exhaustion requirements for a class action suit. Id. (citing Gulley v. Orr, 905 F.2d 1383, 1385 (10th Cir. 1990)).

Judge Duffy previously ruled on this issue in a thorough examination of the facts and law and held that there was an issue of fact as to whether or not plaintiff were mislead into believing that they could not file a class complaint. Defendant asserts that since Judge Duffy's ruling, depositions have been taken and the testimony has resolved an issue of material fact in his favor and, therefore, plaintiff's have failed to show exhaustion, or excuse from exhaustion, relative to a class administrative complaint. After

reviewing the deposition testimony, Mr. Williams and especially Mr. McKelvy were never squarely asked whether or not they talked to the EEO counselor about the possibility of filing a class administrative action.[5] Therefore, defendant has failed to establish that he is entitled to summary judgment on this issue.

However, defendant raised the issue of class certification pursuant to Rule 23, Fed.R.Civ.P, in its memorandum in support of summary judgment. Specifically, defendant states that plaintiffs cannot satisfy the requirements of Rule 23 necessary to maintain a class action. Defendant addresses only the issue of numerosity in its brief.[6] It asserts that the putative class consists of no more than 12 individuals, all of whom live in the Florence, South Carolina area[7] and could have, if desired, joined in this action. Plaintiff has failed to address this issue in its responsive briefs.

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[5] See Judge Duffy's order of February 16, 2000 (Doc. #33) for a discussion of facts previously submitted by affidavit.

[6] Plaintiffs cannot satisfy the other required elements of Rule 23 but their failure to meet those requirements will not be discussed herein.

[7] Plaintiffs describe the class as "employees of USPS Florence, South Carolina plan facility, who are of African-American extraction, and who have applied for and been denied promotions based on their race and who have suffered retaliation by the agents of Defendant as a result of their claims." Plaintiffs' Notice and Motion in Opposition to Defendant's Motion for Summary Judgment (Doc. #95) at p. 3. Plaintiffs rely ion a potential class of 15 in its Memorandum in Reply filed February, 2003, at p. 10.

One of the elements a plaintiff must establish to maintain a class action is numerosity. There is no mathematical test for determining whether in a particular case the requirement of numerosity has been satisfied. Kelly v. Norfolk and Western Railway Company, 584 F.2d 34, 35 (4th Cir. 1978). Additionally, the "practicability of joinder depends on many factors, including for example, the size of the class the ease of identifying its number and determining their addresses, facility of making service on them if joined and their geographic dispersion." Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 878 (11th Cir. 1986). This case has been pending for approximately three years.[8] Through discovery, plaintiffs have had more than ample time to identify other potential class members and develop its class. The party seeking class certification bears the burden of proof. Int'l Woodworkers of Amer. V. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1267 (4th Cir. 1981). Additionally, Local Rule 7.03 states "[a]ttorneys are expected to file motions immediately after the issues raised thereby are ripe for adjudication." Local Rule 7.03, D.S.C. Plaintiff has failed to file its motion to certify the class. The last amended scheduling order issued in this case directed that all motions must be field on or before April 26, 2002. plaintiffs have failed to motion the court to certify the class within the date. Plaintiffs have failed to meet their burden of proving numerosity. Therefore, class certification should be denied and defendant's motion to strike the class action allegations contained in the amended complaint should be granted.

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[8] "Plaintiffs have taken substantial discovery, including 3 sets of interrogatories, tow sets of document requests, and 9 depositions. Over ten thousand pages of documents were produced." Defendant's Brief in Support of Its Motion for Summary Judgment at p.2.

Plaintiffs also assert that they are excused from the exhaustion requirement pursuant to the single filing rule.[9] Judge Herlong set forth the single filing rule or "piggybacking" in Bryson v. Fluor Corp., 914 F. Dupp. 1292 (D.S.C. 1995). In essence, the single filing rule relives a party from the exhaustion requirements when they can rely on a properly exhausted claim of another plaintiff. It involves a two-part test. First, the exhausted claim must have indicated a class claim. Second, the unexhausted claimant must have been able to file a timely claim on the date the exhausted claim was filed.

Some of the plaintiffs satisfy the second prong, but they all fail on the first. The purpose of the EEOC charge is to give notice of the class nature of the claim to the EEOC and the defendant. Id. at 1294 (citing Tolliver v Xerox Corp., 918 F.2d 1052, 1057 (2nd Cir. 1990). Although excused from the class administrative complaint requirement because there is an issue of fact regarding whether the EEOC should have advised them differently, that does nothing to excuse the notice to the defendant. Therefore, plaintiff cannot avail themselves of the single filing rule.

Accordingly, each plaintiff is subject to the exhaustion requirement. Each of plaintiffs' claims are discussed below.

§1981 Claims

42 U.S.C §2000e-16 provides the exclusive judicial remedy for claims of discrimination by federal employees. See Brown v. General Serv. Admin., 425 U.S. 820, 835 (1976); Zombro v. Baltimore City Police Dept., 868 F.2d

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[9] Defendants assert that if the single filing rule were applicable, it would not apply to Gilchrist, Cooks, McKie and Mckithen.

1364, 1368 (4th Cir. 1988). Therefore, plaintiffs' claims under 42 U.S.C §1981 should be dismissed.

Discriminatory Intent Claims

Before a plaintiff has standing to file suit under Title VII, he must exhaust his administrative remedies by filing a charge with the EEOC. See Smith v. First Union Nat'l Bank, 202 F.3d 234, 247 (4th Cir. 2000). The EEOC charge defines the scope of the plaintiff's right to institute a civil suit. Id. "An administrative charge of discrimination does not strictly limit a Title VII suit which may follow; rather, the scope of the civil action is confined only by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination." Chisholm v. United States Postal Serv., 665 F.2d 482, 491 (4th Cir. 1981).

After a plaintiff receives notice of a final administrative decision, i.e., he exhausts his administrative remedies,

> Within 90 days of receipt of notice of final agency action taken by the department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or Order of such department, agency, or unit until such time as final action may Be taken by a department, agency, or unit, an

> employee or applicant for Employment, if aggrieved by the final disposition of his complaint, or by the Failure to take final action on his complaint, may file a civil action as Provided in Section 2000-5 of this title, in which civil action the head of the Department, agency, or unit, as appropriate, shall be the defendant.

42 USC §2000e-16(c). Therefore, a plaintiff must file suit within 90 days of receiving the final agency decision.

In order to establish a prima facie case for discrimination, a plaintiff must establish that (1) he was a member of a protected class; (2) his employer had an open position for which he applied; (3) he was qualified for the position; and (4) he was rejected for the position under the circumstances giving rise to an inference of unlawful discrimination. Taylor v. Virginia Union University, 193 F. 3d 219, 230 (4th Cir. 1999).

If a plaintiff establishes a prima facie case, a defendant may articulate a legitimate, non-discriminatory reason for the plaintiff's termination. Once such a reason is articulated, a plaintiff can refute the articulated reason through (1) showing pretext or (2) showing that the articulated reason is false. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993).[10]

Gray

Defendant asserts that Gray did not apply for a position prior to the filing of the complain in this action.

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[10] In their brief, plaintiffs assert that they need not make a showing on a pretext because they intend to introduce direct evidence of discrimination. Regardless of the veracity of this argument, plaintiffs have failed to present sufficient direct evidence of discrimination.

Plaintiff has failed to present any evidence to the contrary. Additionally, clearly he has failed to exhaust his administrative remedies.

Because, therefore, Gray cannot establish a prima facie case and has not exhausted his administrative remedies, defendant's motion for summary judgment should be granted and Gray's action dismissed.

Lacy

Lacy filed an administrative claims alleging discriminatory actions of defendant in denying his promotional opportunities. He received a final agency decision on August 8, 1995, on one of the complaints and he executed a withdrawal of the other on August 10, 1998.

Because Lacy failed to bring his action within 90 days of receiving final agency decision, his action is time barred. See Baldwin County Welcome Center v. Brown, 466 US 147, 148-150 (1984). To the extent Lacy claims that his voluntary withdrawal of EEO complaint was inappropriate, hi argument is without merit and insufficient to defend against a motion for summary judgment. Therefore, defendant's motion for summary judgment as to Lacy should be granted and Lacy's action dismissed.

Gilchrist

Gilchrist filed four administrative complaints. He received final agency decision on the first complaint on November 20, 1997. That claim is time barred because he failed to file suit within 90 days. The remaining three claims were remanded to the agency by the Administrative Law Judge on April 22, 1999, due to this litigation. In those complaints, he alleges he was relived of his Group leader Custodian position on the basis of race and retaliation; that

he was issued a seven day notice of suspension for failure to perform his duties on the basis of race; and that he was issued a letter instructing him to provide medical documentation for every unscheduled absence, he was harassed and humiliate and he reviewed a letter mandating that he see a employee assistance counselor. The allegations of the complaint in this action clearly exceeds the scope of the administrative investigation that could reasonably be expected to follow the charge set forth in the EEO complaints. Therefore, he has failed to exhaust his claims alleged in this action. Assuming, arguendo, that his claims are timely and have been exhausted, plaintiff presents in sufficient evidence to establish an issue of material fact regarding pretext or falsity of defendant's articulated reason. See discussion under Williams at pp. 31-32. Accordingly, defendant's motion should be granted and Gilchrist's action should be dismissed.

Cooks

Cooks did seek a promotion but was not put on the register because of a failing KSA score. However, he did not file an EEO complaint alleging discrimination. Therefore, he has failed to exhaust his administrative remedies. Defendant's motion, therefore, should be granted and Cooks' complaint dismissed. Assuming, arguendo, that he did exhaust, he has failed to create an issue of material fact as to defendant's articulated reason for denial of promotion. See discussion under Williams at pp. 31-32

McKelvy

McKelvy filed a complaint alleging he was denied consideration for promotion because his supervisor did not rate him under the job element of hand tools. The final agency decision was issued on December 2, 1998. McKelvy failed KSA 31 because of his score on the written

examination. He fails to present sufficient evidence for a reasonable fact finder to find that he was denied promotion for any reason other than failing the written exam. Reeves v. Sanderson Plumbing Products. Inc., U.S. , 120 S.Ct. 2097, 147 L.E.2d 105 (2000). See discussion under Williams at pp. 31-32.

McKithen

McKithen sought promotion in 1996, but his KSA scores were too low to be promoted. He did not file and EEO complaint alleging discrimination. Assuming, arguendo, that he did exhaust his administrative remedies, he has failed to make a sufficient showing to show pretext or falsity of defendant's articulated reason. See discussion under Williams at pp. 31-32. Accordingly, defendant's motion for summary judgment should be granted and McKithen's action dismissed for failure to exhaust administrative remedies.

Williams

Mr. Williams filed several EEO complaints all of which are time-barred under 2000-16 and/or exceed the scope of his complaint in this action, accept for his complaint which had a final agency decision issued on December 8, 1999, in which he alleged that he received a low supervisor's evaluation which accused him to be rated ineligible for the Maintenance Mechanic Test.

In order to prove a prima facie case of discrimination for failure to promote, he must prove that (1) he is a member of a protected group; (2) he applied for the position in question; (3) he was qualified for the poison; and (4) he was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. Taylor v. Virginia Union University, 193 F.3d 219, 230 (4th Cir. 1999).

In the light most favorable to the Williams, he can establish that he is a member of a protected group and he was rejected for the position. However, he fails to create an issue of fact as to whether or not he was qualified for the position. It is undisputed that Williams failed the KSA 31. Plaintiff asserts that he was denied prior access to the MSS supervisor guidelines and the review panel evaluation guidelines material while white candidates were allowed access. He presents evidence this MSS material was kept in a locked file cabinet in a storage room of James Stih at the Florence postal facility; that keys were kept in his desk drawer with other keys; and that custodial personnel had access to his office while cleaning. Therefore, he argues that it was possible that someone could have entered his office, found the right key, opened a locked cabinet drawer, and obtained the MSS material. Assuming that this is true, it does nothing to bolster the plaintiff's case. He fails to set forth any evidence that this improper conduct was actually carried out, except for his own conclusory, unsupported speculation that this could have occurred. Furthermore, he fails to establish that the material in the cabinet would be of benefit to anyone taking the written evaluations. Plaintiff must come forth with specific facts tot defeat a motion for summary judgment and those facts cannot be based on speculation. Plaintiffs fail to create an issue of material fact regarding defendant's articulated reason for denial of promotion. Additionally, he fails to prove that he was qualified for the position. Therefore, defendant's motion for summary judgment should be granted and Williams' complaint dismissed.

Lockhart

Mr. Lockhart applied for a position for which he was denied in December 1992. He subsequently filed a complaint on March 3, 1993, which he subsequently withdrew on August 3, 1993. He claims is time-barred by 2000-e(16).

Additionally, he fails to present sufficient pretext or falsity evidence to survive summary judgment. His supported, consclusory allegations of qualification and knowledge are insufficient to validly challenge defendant's motion. See Vaughn v. Metrahealth Co., 145 F3d 197, 202-03 (4th Cir. 1998). See also discussion under Williams at pp. 31-32. Therefore, defendant's motion for summary judgment should be granted and Lockhart's complaint dismissed.

Family Medical Leave Act and Rehabilitation Act Claims

Plaintiffs do not address these issues in their memorandum. None of the plaintiffs have filed an EEO complaint raising claims of discrimination relating to the FMLA or the Rehabilitation Act. Therefore, such claims are not properly before the court and should be dismissed. See Evans v. Technologies Applications & Service Commission, 80 F.3d 954 (4th Cir. 1996).

Retaliation Claims

In addition to the claim of Gilchrist set forth in the discussion of plaintiff's motion for summary judgment above, each plaintiff that submitted and affidavit assert that they were retaliated against when they were "threatened and harassed by David Brandon."

To prove a claim for retaliation under Title VII, a plaintiff must show (1) he engaged in protected activity, (2) the employer took adverse employment action against him, and (3) a casual connection existed between the protected activity and the adverse action. Ross v. Communication Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).

Plaintiffs simply have failed to produce sufficient evidence to ward off defendant's motion for summary judgment. They have failed to indicate any of the particular

facts necessary to sustain a claim of retaliation. Therefore, defendant's motion for summary judgment should be granted.

Disparate Impact Claims

Plaintiffs simply have failed ot produce sufficient evidence to ward off defendant's motion for summary judgment. They have failed to indicacte any of the particular facts necessary to sustain a claim of retaliation. Therefore, defendant's motion for summary judgment should be granted.

Disparate Impact Claims

A hearing was convened on Monday, January 6, 2003, for purpose of oral arguments on defendant's motion for summary judgment filed April 24, 2002. Just prior to the close of business on Friday, January 3, 2003, plaintiffs filed several affidavits in support of its opposition to defendant's motion. Rule 56 (c) provides that the "adverse party prior to the day of hearing may serve opposing affidavits." Rule 56(c), Fed.R.Civ.P. Local rule 7.06 provides "[a]any memorandum or response of an opposing party must be filed with the Clerk of Court within fifteen (15) days of the service of the motion unless the court imposes a different deadline...Any response supported by discovery material shall specify with particularity the portion of counsel's position, summarize the material in support of counsel's position, and shall attach relevant portions of the discovery material or deposition." L.R. 7.06, D.S.C.

Accordingly, plaintiff's filing of affidavits just before 5:00 p.m. the business day before the hearing is in violation of the local rules and the spirit of the Federal Rules of Civil Procedure. Defendant's motion was pending in excess of eight months before the hearing was held. To make matters

worse, the affidavits address not only issues of fact involving legal theories previously raised, but also legal theories not raised prior to the hearing.

Plaintiffs assert that they sufficiently pleaded or otherwise provided the requisite fair notice to defendants such that they may now proceed to trial on a disparate impact claim. In support of this argument they reference certain portions of their complaint and responses to interrogatories. They cite Ellerth v. Burlington Industries, 102 F.3d 848 97th Cir. 1996) in support of their argument that "there is no requirement that EEOC charges or Title VII complaints plead a particular theory...The complainant wishes to pursue."

In Chisholm v United States Postal Service, the Fourth Circuit stated, [a]n administrative charge of discrimination does not strictly limit a Title VII suit which may follow; rather, the scope of the administrative investigation than can reasonably be expected to follow the charge of discrimination." Id. 665 F.2d 482, 291 (4th Cir. 1981). A review of the administrative complaints filed by the plaintiffs clearly falls within the parameters set forth in Chisholm. A reasonable investigation would include past complaints filed by the plaintiffs which makes the scope to include a disparate impact claim even more clear. Therefore, defendant's argument that plaintiffs are precluded from bringing a disparate impact claim because of the scope of the administrative complaint is without merit.

A disparate impact claim by its nature involves a facially neutral employer practice or procedure, but has a disparate impact upon application of the practice or procedure. Plaintiffs allege that defendant manipulated the "matriculation" process and manipulated the promotion process in a intentionally discriminatory manner. These are not disparate impact allegations. Furthermore, a reasonable

reading of plaintiffs\ amended complaint fails to allege a disparate impact claim as discussed below.

Plaintiffs point to certain provisions in the complaint and their responses to interrogatories in support of their argument that they have sufficiently pleaded a disparate impact claim. Specifically, cite portions of the amended complaint and interrogatory responses as follows:

Complaint

> The defendant Henderson uses this procedure [MSS] at the Florence, South Carolina facility. When coupled wit the tacit approval of racially biased actions of supervisory personnel, as detailed below, this system encourages racial discrimination against black employees of the Defendant Henderson in the maintenance craft.
> a permanent injunction ordering Henderson [to] administer the promotion system of the USPS and the disciplinary system free from the remotest taint of racial bias.

Responses to Defendant's First Set of Interrogatories

> Interrogatory Six. Explain in detail your allegations in paragraphs 11, 15, 42, and 44 of your complaint, that the Postal Service's Florence, South Carolina Facility administers the promotion procedure in manner intended to
> discriminate against black employees in the maintenance Craft.
>
> Response: Black employees do not receive comparable training to white employees White employees are promoted without being on the

register Black employees have to pay for training; after paying for training Black employees are still not updated after training White employees couched into positions and are allowed to obtain training through the postal service.

Response to Local Rule 26.03 interrogatories:

If a candidate fails a portion of the KSA (written exam) required for the position he seeks, his supervisor's evaluation and the review board's rating can off-set the failed portion of the written exam and the candidate becomes ineligible for promotion. Similarly, a candidate passes the required KSA section, has either no supervisor's evaluation or a low supervisor's evaluation and a good score from the review board is rated eligible for promotion. However, a candidate with failures on the written test and who lacks an evaluation or receives a poor evaluation by his supervisor, receives an "ineligible for promotion" rating. Herein lies the problem wit the USPS Promotion system. White candidate routinely reviewed evaluations by their Supervisors soon after hiring. Black candidates never receive a supervisor's Evaluation. Thus, black candidates are required to pass the KSA with a sufficiently high score to overcome the lack of a supervisor evaluation...

Thus, black candidates must pass the KSA for an 'eligible for promotion' rating, while white candidates do not have to pass the KSA for the same rating.

Fed.R.Civ.P. 8(a)(2) requires a "short and plain statement of the claim showing that the pleader is entitle to

relief." The main purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is the grounds upon which it rests." Conlyey v. Gibson, 355 U.S. 41, 47 (1957). "Even under the liberal standards of the Federal Rules of Civil Procedure, however, a plaintiff must at least set forth enough details so as to provide defendant and the court with a fair idea of the basis of the complaint and the legal grounds for recovery." Karpel v. Inova Health System Services, 134 F.3d 1222, 1227 (4th Cir. 1998)(internal quote omitted).

This case has been pending for several years, a substantial amount of discovery has been completed and exchanged, and a number of motions have been heard and hearing held. Defendant's motion upon which we are now here, has been pending for approximately eight months. Plaintiffs did not mention a disparate impact theory in their responsive motion and, in fact, the motion, the complaint, responses to interrogatories and other filings are littered wit references to defendant's intentional discrimination, until the hearing was convened on defendant's motion on January 6, 2003.

A fair reading of the complaint simply does not provide fair notice to the defendant of a disparate impact claim For the matter, neither does the interrogatory responses identified by the plaintiffs. The court should not consider this claim because plaintiffs have failed to include it within the amended complaint.

In the even that the district judge does not agree that plaintiffs have failed to raise a disparate impact claim, the merits will be discussed below.

Under a disparate impact claim, plaintiffs assert that they were not permitted to matriculate fairly (white employees were given supervisor scores as of course and black employees were not), black employees were not given

the training and experience necessary to or helpful in obtaining promotion, and black employees could not compete with white employees who "more probably than not" either had, or had access to, testing material.[11]

Plaintiff confuses the two theories of disparate impact and disparate treatment. To the extent they argue that defendant manipulated the system for discriminatory purposes, that is not disparate impact but disparate treatment. The evidence is uncontradicted that plaintiffs' scores on the written examinations were too low for promotion eligibility regardless of the supervisor evaluations. Thus, assuming arguendo, that plaintiffs have presented sufficient evidence to show white employees were given supervisor evaluations to the exclusion of black employees, it does little to bolster their cases. They have not presented any evidence to establish that they were qualified for the promotion. In their affidavits, plaintiffs set forth their various job experiences, training and other factors. Their experiences are commendable and impressive. However, regardless of what experiences they possess, the fact remains that, upon the record before the court, they were not qualified because they failed the testing requirements to qualify for promotion eligibility. The court would have to speculate as to the relevancy of each of plaintiffs listed experiences, training and other factors, to the specific job they sought. This, of course, would be improper and is insufficient to adequately contest defendant's motion for summary judgment. They have failed to show that had they had the MSS material or been evaluated earlier, or the existence of any other improper factor, they would have been able to qualify for eligibility. Therefore, they fail to present sufficient admissible evidence that there is a causal connection between any alleged

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[11] The undersigned does not address the issue of the scope of the disparate impact claim under the administrative complaint or the amended complaint.

misconduct, or any other conduct or practice or systematic process, of the defendant and plaintiffs' exclusion from promotion. Defendant's motion for summary judgment should be granted.

Plaintiff sets forth the elements of a disparate impact claim: (1) identify the particular practices that purportedly caused the impact; (2) showing the existence of a legally significant disparity; and (3) demonstrating a causal connection between the two.

Plaintiffs identify the particular practice as the "requirements and policies governing the maintenance of the integrity of the test, including access to testing materials created and adverse impact on black employees." Plaintiffs' Supplemental Reply at p.8.

As discussed above, plaintiffs have failed to present sufficient evidence that anyone had improper access to the tests. They merely present a scintilla of circumstantial evidence that it is possible that white employees could have had access to the MSS material. Furthermore, plaintiffs fail to establish that what was contained in the MSS material. Furthermore, plaintiffs fail to establish that what was contained in the MSS materials would enable someone to obtain a better score on the examination(s) involved in the promotion process. Accordingly, plaintiffs claim is without merit and should the district judge believe the claim was properly pleaded, dismiss the claim.

Additionally, plaintiffs present statistical evidence in an effort to establish a legally significant disparity. Specifically, they state "there were approximately forty (4) workers in the Maintenance Craft during this time frame. There were 15 black males, twenty-four white males and one white female. Blacks accounted for 37 percent of the

workforce, "but held only four of the upper level positions or 10% of the upper level positions.

Defendant correctly cites Moultrie v. Martin, 690 f.2d 1078 (4th Cir. 1982) For the rule in this circuit that "in all cases involving racial discrimination, the courts of this circuit must apply a standard deviation analysis such as that approved by the Supreme Court in Hazelwood before drawing conclusions from statistical comparisons." Id. at 1082. In fact, this principle was applied in the case plaintiffs cite in support of their argument. See Thomas v. Washington County School Board, 915 F.2d 922, 926 (4th Cir. 1990). Therefore, plaintiff'' reliance on raw statistics is without merit.

As to other evidence, besides the raw statistics, plaintiff fail to present sufficient evidence to survive summary judgment. Plaintiffs state by affidavit[12] that they wanted promotions but that discriminatory practices has a disparate impact on their ability to be promoted.

The evidence presented is insufficient to effectively challenge defendant's motion for summary judgment. Therefore, should the district judge find a disparate impact claim raised in the complaint, grant defendant's motion for summary judgment and dismiss plaintiffs' claims of disparate impact.

For the foregoing reasons, it is **RECOMMENDED** that plaintiffs' motion for summary judgment be **DENIED** and defendant's motion for summary judgment be

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[12] Much of that contained in the affidavits involves inadmissible hearsay and self-serving, conclusory statements, and some of which contradicts prior deposition testimony. As set forth above, it would be improper for the court to consider such evidence under Rule 56 motion.

GRANTED. It appear from the record that the last three EEO complaints filed by Gilchrist were remanded o the agency by the ALJ because of the litigation. The court should remand those claims to the EEOC.

/s/Thomas E. Rogers, III
United States Magistrate Judge

February 28, 2003
Florence, South Carolina

U.S. Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

James Williams, Jr., Complainant,
v.
John E. Potter, Postmaster General
United States Postal Service, Agency.

Appeal No. 01991876
Agency No. 4D-290-1098-96
Hearing No. 140-97-8233X

DECISION

Pursuant to 29 C.F.R. § 1614.405, the Commission accepts the complainant's appeal from the agency's final order in the above-entitled matter. Complainant alleged that the agency discriminated against him based on race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, when he received a low supervisor's evaluation which, in complainant's view, caused him to be rated ineligible for the General Mechanic test.

Complainant's case was heard by an EEOC Administrative Judge, who subsequently issued a recommended decision[13] (RD) finding no discrimination. On December 8, 1998, the agency adopted the RD and issued a final agency decision finding no discrimination.

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[13] Under the Commission regulations then is effect, an agency could adopt, reject, or modify the recommended decision of an AJ. Under current Commission regulations, the decision of an AJ is binding on both parties, subject o the right of appeal to the Commission.

The record reflects that complainant, then a Laborer Custodian, PS-3, at the agency's Florence, South Carolina Processing and Distribution Center, had tested for the position of General Mechanic in 1994. Complainant failed several of the knowledge, skills, and abilities (KSA) requirements for the position, and so was rated "ineligible." Complainant subsequently had the opportunity to update his KSAs, but still remained ineligible. In his EEO complaint, complainant claimed that his current "ineligible" rating was attributable to a discriminatory supervisory evaluation. Complainant claimed that his supervisor (the Supervisor, Maintenance Operations or SMO) gave him a rating of "cannot evaluate" on the job element of "hand tools," despite the fact that complainant had worked under his supervision for about two years and had, in fact, used hand tools to perform various tasks.

In her RD, the AJ discredited the testimony of the SMO that he had not observed complainant using hand tools and so was unable to rate him in that regard. The AJ noted that the SMO had no trouble evaluating the use of hand tools by two White Custodians who had worked for him for only three months and three weeks, respectively. The AJ further noted testimony of eyewitnesses to complainant's use of hand tools, including testimony that the SMO had assigned complainant to perform various tasks requiring the use of hand tools. In addition, the AJ expressly found the SMO not be a credible witness based upon his "Very defensive" demeanor at the hearing. However, the AJ nonetheless issued a finding of no discrimination, noting the testimony of the Maintenance Selections System Coordinator that a rating of "cannot evaluate" does not affect an employee's eligibility rating, and evidence of record that complainant had failed a required written examination which would have caused him to be rated "ineligible" regardless of the supervisory evaluation.

In any proceeding, either administrative or judicial, involving an allegation of discrimination, it is the burden of the complainant to initially establish that there is some substance to his or her allegation. In order to accomplish this burden the complainant must establish a *prima facie* case of discrimination. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *see also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978). This means that the complainant must present a body of evidence such that, were it not rebutted, the trier of fact could conclude that unlawful discrimination did occur. The burden then shifts to the agency to articulate a legitimate, non-discriminatory explanation for its action. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). In this regard, the agency need only produce evidence sufficient "to allow the trier of fact rationally to conclude" that the agency's action was not based on unlawful discrimination. *Id.* at 257. Once the agency has articulated such a reason, the question becomes whether the proffered explanation was the true reason for the agency's action, or merely a pretext for discrimination. *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 511 (1993).

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an Administrative Judge will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 477 (1951) (citation omitted.) A finding regarding whether or not discriminatory intent existed is a factual finding. *See Pullman-Standard Co. v. Swint*, 456 U.S. 273, 293 (1982).

After a thorough review of the record, the Commission agrees with the AJ that the rating of complainant as "ineligible" was not discriminatory, in that complainant

would have bee rated ineligible regardless of the SMO's failure to assign a rating to the KSA of Hand Tools. However, based on the AJ's findings of fact, the Commission also finds that the agency's articulated reason for the SMO's failure to rate complainant on the KSA of Hand Tools is not worthy of belief. In light of evidence establishing a *prima facie* case and the findi ıg by the AJ that the agency's articulated reason lacked credibility, the Commission finds that the SMO's action in not rating complainant on the KSA of Hand Tools constitutes discrimination based on race. Therefore, after a review of the record in its entirety, including consideration of all statements submitted on appeal, it is the decision of the Equal Employment Opportunity Commission to AFFIRM the final agency order with regard to the ineligibility rating but to REVERSE the agency as to the SMO's failure to assign a rating for the KSA of Hand Tools, and to find that the agency discriminated against complainant as alleged.

ORDER(CO900)

The agency is ordered to take the following remedial action:

(1) Within thirty (30) days of the date on which this decision becomes final, the agency shall evaluate complainant's proficiency with hand tools and shall provide complainant with a revised rating for the applicable KSA. If necessary, the agency shall solicit relevant information from complainant's coworkers and agency officials other than the SMO in order to complete the evaluation. The agency shall remove the discriminatory rating and all references to it from complainant's official files.

(2) The claim for compensatory damages is REMANDED to the Hearings Unit of the Charlotte District Office. Thereafter, the Administrative Judge shall issue a decision on this claim in accordance with 29 C.F.R. §

1614.109, and the agency shall issue a final action in accordance with 29 C.F.R. § 1614.110 within forty (40) days of receipt of the Administrative Judge's decision. The agency shall submit copies of the Administrative Judge's decision and the final agency action to the Compliance Officer at the address set forth below.

(3) Within sixty (60) days of the date on which this decision becomes final, the agency shall provide EEO training to the SMO.

(4) The agency shall consider taking disciplinary action against the SMO. The agency shall report its decision. If the agency decides to take disciplinary action, it shall identify the action taken. If the agency decides not to take disciplinary action, it shall set forth the reason(s) for its decision not to impose discipline.

The agency is further direct to submit a report of compliance, as provided in the statement entitled "Implementation of the Commission's Decision." The report shall include supporting documentation verifying that the corrective action has been implemented.

[Omitting formal parts regarding Posting Order, Attorney's Fees, Implementation, Statement of Rights on Appeal, and Right to Request Counsel.]

FOR THE COMMISSION

/s/ Carlton M.Hadden, Director
Office of Federal Operations

Dec. 20, 2001